Supreme Court, U.S.
FILED

01 873 OCT 30 2001

OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

EDWIN R. BOWEN, WARDEN,

Petitioner,

v.

KEVIN RICE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES E. RYAN
Attorney General of Illinois

JOEL D. BERTOCCHI
Solicitor General of Illinois

WILLIAM L. BROWERS
Counsel of Record
DAVID H. ISKOWICH
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5643

Counsel for Petitioner

Printed by Authority of the State of Illinois (P.O. 29147—50—10-31-01)

49 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Circuit's holding that the existence of an "exception" to the Illinois Post-Conviction Hearing Act's statute of limitations allows an untimely filing to be considered "properly filed" under the AEDPA conflicts with the intent and purpose of the AEDPA and this Court's decision in *Artuz v. Bennett*, 531 U.S. 4 (2000)?

2. Whether the Seventh Circuit's inquiry into whether a collateral petition in state court has been "properly filed" for tolling purposes under the AEDPA is in conflict with the rule set forth by this Court in *Harris v. Reed*, 489 U.S. 255 (1989)?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 5

I. *Certiorari* Should Be Granted Because The Seventh Circuit's Holding, That The Existence Of An Exception To The Illinois Post-Conviction Hearing Act's Statute Of Limitations Allows An Untimely Filing To Be Considered "Properly Filed," Conflicts With The Intent And Purpose Of The AEDPA And This Court's Decision In *Artuz v. Bennett*, 531 U.S. 4 (2000) 5

II. *Certiorari* Should Be Granted Because The Seventh Circuit's Decision Finding That The State Post-Conviction Petition Was "Properly Filed" Is In Conflict With This Court's Decision in *Harris v. Reed*, 489 U.S. 255 (1989) 15

CONCLUSION 19

APPENDIX ..... *infra*

TABLE OF AUTHORITIES

PAGE(S)

United States Supreme Court Cases

Artuz v. Bennett,
531 U.S. 4 (2000) ..... *passim*

Chambers v. Mississippi,
410 U.S. 284 (1973) 2, 3

Coleman v. Thompson,
501 U.S. 729 (1991) 15-16, 17

Gryger v. Burke,
334 U.S. 728 (1948) 9-10

Harris v. Reed,
489 U.S. 255 (1989) ..... *passim*

Mullaney v. Wilbur,
421 U.S. 684 (1975) 9

O'Sullivan v. Boerckel,
526 U.S. 838 (1999) 17-18

Ramdass v. Angelone,
530 U.S. 156 (2000) 18

Williams v. Taylor,
529 U.S. 362 (2000) 18

Other Cases

Coleman v. Ryan, et al.,
196 F.3d 793 (7th Cir. 1999) 10

Dictado v. Ducharme,
244 F.3d 724 (9th Cir. 2001) 8

Emerson v. Johnson,
243 F.3d 931 (5th Cir. 2001) 8-9

Fernandez v. Sternes,
227 F.3d 977 (7th Cir. 2000) 16

Freeman v. Page,
208 F.3d 572 (7th Cir. 2000) 16

Jefferson v. Welborn,
222 F.3d 286 (7th Cir. 2000) 16

People v. Lee,
292 Ill.App.3d 941, 688
N.E.2d 673 (3rd Dist. 1997) 11

People v. Rice,
247 Ill.App.3d 415, 617
N.E.2d 360 (1st Dist. 1993) 2

People v. Rice,
166 Ill.2d 35, 651
N.E.2d 1083 (1995) 2

People v. Rice,
286 Ill.App.3d 394, 675
N.E.2d 944 (1st Dist. 1996) 2

People v. Rissley,
___ Ill.2d ___, ___ N.E.2d ___
(2001), 2001 Ill.LEXIS 241 ..... 11, 12

People v. Robinson,
___ Ill.App.3d ___, ___ N.E.2d
___ (2nd Dist. 2001) 2001 Ill.App.
LEXIS 706 11

People v. Scullark,
___ Ill.App.3d ___, ___ N.E.
2d ___, 2001 Ill.App.LEXIS
134 (1st Dist. 2001) 11

Rice v. Bowen,
___ F.3d ___ (7th Cir. 2001),
2001 U.S.App.LEXIS 14842 ..... *passim*

Rice v. Bowen,
2001 U.S.Dist.LEXIS
14058 (N.D.Ill. 2001) 4

Rice v. Haws,
2000 U.S.Dist.LEXIS
16425 (N.D.Ill. 2000) 3, 13

Rouse v. Iowa,
110 F.Supp.2d 1117
(N.D. Iowa 2000) 13

Smith v. Ward,
209 F.3d 383 (5th Cir. 2000) 8, 9

Federal Statutes

28 U.S.C. §1254(1) 1

28 U.S.C. §1291 1

28 U.S.C. §2244(d)(1)(A) 3

28 U.S.C. §2244(d)(2) 3, 6, 13, 15

28 U.S.C. §2253 1

28 U.S.C. §2254 2-3

Additional Authority

725 ILCS 5/122-2.1(a)(2) 5

725 ILCS 5/122-2.1(b) 5

725 ILCS 5/122-1(c) 5, 10

725 ILCS 5/122-5 5

LA.CODE CRIM.P. art. 930.8A 9

Tex.R.App.P. §213(b) 8

Wa.Rev.Code §10.73.140 8

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Edwin Bowen, respectfully requests that this Court issue a writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on June 28, 2001.

OPINION BELOW

The June 28, 2001 decision of the United States Court of Appeals for the Seventh Circuit is published as *Rice v. Bowen*, ___ F.3d ___ (7th Cir. 2001), 2001 U.S.App.LEXIS 14842, which is reprinted in the appendix to this petition. The August 2, 2001 order denying Rice's Petition for Rehearing with Suggestion for Rehearing *En Banc* is reported at 2001 U.S.App.LEXIS 18484 (7th Cir. Aug. 2, 2001), and is also reprinted in the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on June 28, 2001, and rehearing was denied on August 2, 2001. Jurisdiction in this Court is proper under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The United States District Court for the Northern District of Illinois asserted jurisdiction in this case pursuant to 28 U.S.C. §2254, and the United States Court of Appeals for the Seventh Circuit asserted jurisdiction under 28 U.S.C. §§1291 and 2253.

In 1992, a jury in the Circuit Court of Cook County, Illinois convicted petitioner Kevin Rice ("Rice") of possession with intent to deliver a controlled substance, and the trial court thereafter sentenced him to a prison term of 20 years. The Illinois Appellate Court, First District, reversed the conviction, however, after finding a violation of *Chambers v. Mississippi*, 410 U.S. 284 (1973), and ordered a new trial. *People v. Rice*, 247 Ill.App.3d 415, 617 N.E.2d 360 (1st Dist. 1993). The State appealed, and the Illinois Supreme Court reversed the Appellate Court's adjudication of the *Chambers* issue and remanded for consideration of Rice's remaining claims. *People v. Rice*, 166 Ill.2d 35, 651 N.E.2d 1083 (1995). On remand, the appellate court affirmed the remaining issues. *People v. Rice*, 286 Ill.App.3d 394, 675 N.E.2d 944 (1st Dist. 1996). On June 4, 1997, the Illinois Supreme Court denied Rice's petition for leave to appeal. Rice did not file a petition for writ of *certiorari* in this Court.

While his direct appeal wound its way through the state courts, Rice commenced a post-conviction attack in the Circuit Court of Cook County, pursuant to the Illinois Post-Conviction Hearing Act (725 ILCS 5/122-1, *et seq.*), on September 12, 1996. On February 26, 1997, the trial court summarily dismissed the petition as frivolous and patently without merit pursuant to 725 ILCS 5/122-2.1 (allowing court's summary dismissal, and precluding input from state or further pleadings or argument from petitioner). Rice appealed, and on May 17, 1999, the Illinois Appellate Court, First District, affirmed, finding that the petition was both time-barred and without merit. The Illinois Supreme Court denied further review on October 6, 1999.

On June 30, 2000, Rice, represented by counsel, filed a petition for writ of habeas corpus pursuant to 28

U.S.C. §2254. On August 30, 2000, Edwin Bowen ("Bowen") moved to dismiss the petition as time-barred under the AEDPA's one-year statute of limitations. *See* 28 U.S.C. §2244(d)(1)(A). Bowen argued that because the appellate court determined that Rice's petition for post-conviction relief was untimely under state law, it was not "properly filed" for purposes of tolling the AEDPA's statute of limitations, as set forth in 28 U.S.C. §2244(d)(2). Bowen calculated that Rice's habeas petition was due no later than September 3, 1998, one year following the Illinois Supreme Court's decision to deny his petition for leave to appeal, plus 90 days within which he could have sought *certiorari* in this Court. The district court agreed, dismissed the petition on September 29, 2001, and declined to issue a certificate of appealability. *Rice v. Haws*, 2000 U.S.Dist.LEXIS 16425 (N.D.Ill. 2000). (Included in Appendix)

Rice asked the United States Court of Appeals for the Seventh Circuit for a certificate of appealability, and, on March 21, 2001, the Seventh Circuit obliged, finding in a summary order that the petition was not untimely and granting certification of the *Chambers* issue. Rice filed his brief on April 20, 2001, and cited to the trial transcripts, which were not a part of the record in the district court. Accordingly, on April 30, 2001, Bowen filed a Motion to Strike the brief. On June 28, 2001, the Seventh Circuit denied Bowen's motion to strike as moot, finding that the habeas petition was not time-barred. The Seventh Circuit held, in particular, that the existence of the statutory "lack of culpable negligence" exception to an untimely filed post-conviction petition required that the state courts consider the merits of the petition. The court found that because the state appellate court allegedly reviewed the merits raised in Rice's

post-conviction petition despite its untimely filing, it must be deemed "properly filed" for purposes of the AEDPA's tolling authority.

Furthermore, the Seventh Circuit rejected Bowen's view that the appellate court's alternative finding of untimeliness mandated a finding that the petition was not "properly filed," and was, therefore, insufficient for tolling under the AEDPA. The Seventh Circuit also held that the state trial court's summary finding that the petition was "frivolous" was also a merits determination. The court ordered that the dismissal entered by the district court be vacated, and the case was remanded for full review of the merits of the claims raised in the habeas petition. *Rice v. Bowen*, ___ F.3d ___ (7th Cir. 2001), 2001 U.S.App.LEXIS 14842. (Included in Appendix).

On July 11, 2001, Bowen sought rehearing and rehearing *en banc*. The petition was denied on August 2, 2001, and the mandate was entered on the same day. No judge in active service requested a vote thereon, and no judge from the original panel voted for rehearing. (Included in Appendix). On August 3, 2001, Bowen filed a motion for the court to recall its mandate and stay proceedings pending Bowen's petition for writ of *certiorari*. That motion was denied on August 9, 2001.

On September 7, 2001, the district court denied relief on the merits. *Rice v. Bowen*, 2001 U.S.Dist.LEXIS 14058 (N.D.Ill. 2001). This case is currently being briefed on the merits in the Seventh Circuit as *Rice v. Bowen*, No. 01-3500. On October 26, 2001, that court denied Bowen's Motion to Stay Proceedings pending resolution of this petition.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because The Seventh Circuit's Holding, That The Existence Of An Exception To The Illinois Post-Conviction Hearing Act's Statute of Limitations Allows An Untimely Filing To Be Considered "Properly Filed," Conflicts With The Intent And Purpose Of The AEDPA And This Court's Decision In *Artuz v. Bennett*, 531 U.S. 4 (2000).

As recounted above by Bowen, the Circuit Court of Cook County denied Rice's petition for post-conviction relief on the grounds that it was "frivolous and patently without merit." Rice appealed. The State, in its brief, argued that the petition was time-barred under the statute of limitations which governs filings under the Illinois Post-Conviction Hearing Act. 725 ILCS 5/122-1(c).[1] In his reply brief, Rice argued, for the first time, that his attorney rendered inaccurate advice regarding the applicable statute of limitations. The appellate court found that the petition was without merit, and, in an

---

[1] A collateral petition must be dismissed within 90 days if the petition is "frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2). If the petition is not dismissed pursuant to that section, the trial court must order that the petition be docketed for further consideration. 725 ILCS 5/122-2.1(b). Within 30 days of docketing for further consideration, the State is obligated to file a responsive pleading. 725 ILCS 5/122-5. In the case at bar, the trial court dismissed Rice's petition on its own accord within 90 days of its filing, as required by Section 122-2.1(a)(2). Therefore, because the State did not have the opportunity to enter its own pleadings in the trial court, the time-bar defense was raised for the first time in the State's brief on appeal.

alternative holding, found that the petition was, in fact, barred by the applicable statute of limitations. In the district court, Bowen argued that the state court's determination that the petition was untimely meant that it was not "properly filed" for purposes of tolling the AEDPA.

Tolling the AEDPA's one-year limitations period is permissible as long as a petitioner has pending a "properly filed" application for post-conviction or other collateral review in state court. *See* 28 U.S.C. §2244(d)(2) ("time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection"). In *Artuz v. Bennett*, 531 U.S. 4 (2000), this Court held that a post-conviction petition is "filed" when "it is delivered to, and accepted by, the appropriate court officer for placement into the official record." *Artuz*, 531 U.S. at 8. An application "is *properly* filed when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz*, 531 U.S. at 8 (emphasis in original).

Whether a petition is "properly filed" is a separate question from whether "the claims *contained in the application* are meritorious and free of procedural bar." *Artuz*, 531 U.S. at 9 (emphasis in original). In other words, this Court noted the difference between statutes which govern conditions to filing, and statutes which govern the conditions to securing relief for the claims presented in the petition. As examples of conditions to filing, this Court listed "the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee." *Artuz*, 531 U.S. at 8. A petition that does not comply

with this type of condition to filing is not "properly filed" under the AEDPA. However, a petition that does not comply with a condition to obtaining relief may, nevertheless, be considered "properly filed." *Artuz*, 531 U.S. at 9-10. The collateral petition in *Artuz* was "properly filed" because it was rejected by the state court not on a condition of filing, but, rather, on a condition of securing relief, inasmuch as the claims raised therein were either waived or *res judicata*. *Artuz*, 531 U.S. at 11.

The court below was likewise confronted with the question of whether the petitioner's post-conviction petition was "properly filed" in accordance with state law, and could, therefore, toll the AEDPA's statute of limitations. As noted, the Illinois trial court denied Rice's petition as "frivolous and patently without merit," and the appellate court, in affirming, determined that the petition was without merit and time-barred by the applicable statute of limitations. A finding of untimeliness has been categorized by this Court as one of several conditions to filing, which include "the form of the document, *the time limits upon its delivery*, the court and office in which it must be lodged, and the requisite filing fee." *Artuz*, 531 U.S. at 8 (emphasis added).

In maneuvering around the state court's clear and express application of the state statute of limitations (and, in doing so, summarily finding that the applicable state statute of limitations is merely a condition to obtaining relief, rather than a condition to filing), the Seventh Circuit reasoned that "Illinois provides a statutory exception to its post-conviction time limitation," and therefore "the state courts had to consider the merits of Rice's petition before determining whether it was timely." *Rice v. Bowen*, ___ F.3d ___, 2001 Ill.App.LEXIS 14842, at *9. Accordingly, the court found that Rice's

post-conviction petition was "properly filed," and that its filing, therefore, tolled the AEDPA. In reaching this conclusion, the Seventh Circuit referenced *Dictado v. Ducharme*, 244 F.3d 724 (9th Cir. 2001), *Emerson v. Johnson*, 243 F.3d 931 (5th Cir. 2001), and *Smith v. Ward*, 209 F.3d 383 (5th Cir. 2000), all of which held that otherwise untimely or impermissible post-conviction petitions were "properly filed" for purposes of the AEDPA, even though they were untimely or not permitted by statute. *Dictado*, *Emerson*, and *Smith* premised their holdings on this Court's acknowledgment in *Artuz* that this Court expressed "no view on the question whether the existence of certain exceptions to a timely filing requirement can prevent a late application from being considered." *Artuz*, 531 U.S. at 8, n.2.

In *Dictado*, there was no dispute that the collateral petition brought pursuant to Wa.Rev.Code §10.73.140 was untimely. *Dictado*, 244 F.3d at 727. However, because the statute contained exceptions to the statutory time limit "which require a state court to examine the merits of a petition before it is dismissed, the petition, even if untimely, should be regarded as 'properly filed.'" *Dictado*, 244 F.3d at 728. The statute of limitations, rather than acting as a "condition to filing," served only as a "condition to obtaining relief," *Dictado*, 244 F.3d at 728, and the petitioner's personal restraint petition, as it was "properly filed," could toll the AEDPA.

In *Emerson*, the petitioner filed a motion to reconsider the dismissal of his state habeas corpus petition in the Texas Court of Criminal Appeals. This pleading, however, was barred by Tex.R.App.P. §213(b), which precluded unsuccessful petitioners from seeking rehearing or reconsideration following the dismissal of a state habeas corpus petition. However, the Fifth Circuit rec-

ognized that, on a number of occasions, Texas courts had entertained motions for reconsideration. *Emerson*, 243 F.3d at 934-935. Therefore, it could not be said that the motion for reconsideration filed in violation of the Texas rules of appellate procedure was not "properly filed." The petitioner's motion, as a result, tolled the AEDPA.

And, in *Smith*, the Fifth Circuit held that the Louisiana petitioner's untimely collateral petition was, nevertheless, "properly filed," because the applicable provision, LA.CODE CRIM. P. art. 930.8A, which imposed a three-year statute of limitations for filing such applications, allowed the state courts to consider the merits of the petition under certain circumstances. *Smith*, 209 F.3d at 385. Those exceptions involved such substantive determinations as a showing that "the facts upon which the claim is predicated were not known to the petitioner or his attorney," or that the petition raises a claim that is "based on a final ruling of an appellate court establishing a theretofore unknown interpretation of constitutional law* * *." *Smith*, 209 F.3d at 385.

The statutes at issue in *Dictado*, *Emerson*, and *Smith*—inasmuch as their exceptions arguably mandate a review of the merits of the petitions notwithstanding apparent procedural deficiencies—provide a sharp contrast to the statute at issue in the case at bar. The Seventh Circuit's conclusion that, in order to find culpable negligence, the state reviewing court must necessarily conduct a review of the merits of the petition, utterly fails to defer to or respect the Illinois courts' interpretation of its own post-conviction statute, which, in habeas corpus, is a basic tenet of federalism. After all, the state courts are the ultimate expositors of state law. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (accepting as correct Maine's interpretation of its homicide law); *Gryger v.*

Burke, 334 U.S. 728, 731 (1948) (declining to embark on its own interpretation of a Pennsylvania sentencing statute for habitual criminals); *Coleman v. Ryan, et al.*, 196 F.3d 793, 799 (7th Cir. 1999) (refusing to conduct its own interpretation of the Illinois capital sentencing statute where the Illinois Supreme Court had already spoken on the issue).

The state law which the Seventh Circuit saw fit to interpret—the Illinois Post-Conviction Hearing Act, 725 ILCS 5/122-1, *et seq.*—requires that a petition be filed not "more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed or more than 45 days after the defendant files his or her brief in the appeal of a sentence before the Illinois Supreme Court (or more than 45 days after the deadline for the filing of the defendant's brief with the Illinois Supreme Court if no brief is filed) or 3 years from the date of conviction, whichever is sooner." 725 ILCS 5/122-1(c). The defendant has the burden to demonstrate that the delay in filing, if any, was not due to his culpable negligence. 725 ILCS 5/122-1(c). Accordingly, Rice was required to allege facts demonstrating that his delay in filing his post-conviction petition in the Circuit Court of Cook County was not due to his culpable negligence. In his post-conviction petition, Rice did not plead any facts in support of a "lack of culpable negligence" excuse; indeed, he did not even acknowledge, until he filed his reply brief on appeal, that the petition was filed outside of the statute of limitations.

While the Post-Conviction Hearing Act does contain the "lack of culpable negligence" exception to timely filing, the statute does not require, as the statutes at issue the Fifth and Ninth Circuits arguably do, that the reviewing court look to the underlying merit of the

claims raised in the petition in order to determine whether the lateness of the petition is due to the petitioner's culpable negligence. Rather, the courts must look solely to the tardy petitioner's excuse for late filing. The Illinois Appellate Court has suggested that the allegations of fact showing an absence of culpable negligence need not themselves be in the petition. *People v. Scullark*, ___ Ill.App.3d ___, ___ N.E.2d ___, 2001 Ill. App.LEXIS 134 (1st Dist. 2001). If the facts showing lack of culpable negligence need not appear in the petition itself, it follows that the reviewing court cannot possibly have recourse to examine the merits of the petition in its search for the statutory exception. Further, "the trial court is under no . . . obligation to search the record for a basis upon which to find an excuse for the late filing of a petitioner's post-conviction petition . . ." because "the petitioner bears the burden of establishing that his delay in filing a post-conviction petition was not the result of his own culpable negligence." *People v. Robinson*, ___ Ill.App.3d ___, ___ N.E.2d ___ (2nd Dist. 2001), 2001 Ill. App.LEXIS 706, *6. If the trial court has no obligation to "search the record," similarly it cannot be said that the court has recourse to "consider the merits of [the] petition before determining whether it was timely." *Rice*, 2001 Ill.App.LEXIS 14842, at *9. *See also People v. Lee*, 292 Ill.App.3d 941, 688 N.E.2d 673 (3rd Dist. 1997) (incorrect advice by counsel on direct appeal regarding post-conviction statute of limitations insufficient to escape culpable negligence; trial court's order dismissing petition as untimely affirmed); *People v. Rissley*, ___ Ill.2d ___, ___ N.E.2d ___ (2001), 2001 Ill.LEXIS 241, *13-15 (same; trial court's order denying State's motion to dismiss based on statute of limitations reversed).

Rissley is particularly relevant for exposing the error of the Seventh Circuit's analysis in this case. In *Rissley*, the petitioner raised a number of ineffective assistance of counsel claims related to trial counsel's performance in a late post-conviction petition. The trial court denied the State's motion to dismiss the petition as time-barred, but the State continued to assert that argument on appeal, and the petitioner continued to maintain that the delay in filing was not due to his culpable negligence. The Illinois Supreme Court disagreed, finding that petitioner had failed to make a showing that the delay in filing was not due to his culpable negligence. Under the Seventh Circuit's reasoning, the Illinois Supreme Court, in order to review the validity of the petitioner's culpable negligence argument, necessarily reviewed the substance of the underlying ineffective assistance claims themselves. Of course, the Illinois Supreme Court never did so: an examination into defendant's ability to plead facts showing a lack of culpable negligence is an entirely separate undertaking from reviewing a Sixth Amendment ineffective assistance of counsel claim. Not surprisingly, the Illinois Supreme Court majority opinion made no reference to the merits of any of the petitioner's substantive ineffective assistance claims. Indeed, the *Rissley* dissent is emphatic in its concern that defendant's underlying constitutional claims were not substantively addressed in light of the majority's finding that the statute of limitations had run and Rissley had not demonstrated that the delay was not due to his culpable negligence. *Rissley*, at *22 ("the majority analysis furnishes a convenient and superficial means of avoiding an eye-opening discussion of trial counsel's utter ineptitude.")

The ill effect of the Seventh Circuit's intrusion into the realm of Illinois law by means of this Court's *Artuz* foot-

note is just as apparent in the case at bar. In his reply brief on appeal from the denial of post-conviction relief, Rice argued that the "delay in filing his petition was not due to [his] culpable negligence, but rather to his attorney's mistake." *Rice v. Haws*, 2000 U.S.Dist.LEXIS 16425 (N.D.Ill. 2000), *7-8. Surely, the state appellate court did not have to review the merits of the substantive claims raised in the petition in order to determine whether the untimely filing should be excused in light of counsel's misinterpretation of Illinois law. In fact, it did not. While an Illinois petitioner who properly raises the "lack of culpable negligence" statutory exception may be entitled to an inquiry into whether the exception has been met, he is not entitled to the quite different inquiry into the merits of his untimely petition, especially where the statutory exception has nothing to do with the merits of the petition in the first place. The Seventh Circuit's holding that "the state courts had to consider the merits of Rice's petition before determining whether it was timely," *Rice*, 2001 Ill.App.LEXIS 14842, at *9, simply ignores the Illinois courts' interpretation of state law and exploits this Court's *Artuz* footnote to further dilute the AEDPA's statute of limitations.

In its *Rice* decision, the Seventh Circuit has established what one court has termed a "false comity:" an interpretation of §2244(d)(2) "that treats *all* untimely, successive, or abusive post-conviction relief applications as 'properly filed,' on the ground that state procedural rules *might* permit such applications, *if* certain conditions are met, but ignores a state court's determination that a specific post-conviction relief application is indeed procedurally barred." *Rouse v. Iowa*, 110 F.Supp.2d 1117, 1139 (N.D. Iowa 2000) (emphasis in original). This cannot be what was intended by Congress in its passage

of the AEDPA's tolling provision, nor can it be reconciled with *Artuz*, where this Court determined that a post-conviction petition is properly filed "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings," including, in particular, the concern of timeliness. *Artuz*, 531 U.S. at 8. Nor can the Seventh Circuit's decision be read as a fair answer to this Court's query in footnote 2 in *Artuz*, as such an answer—that the mere existence of statutory exceptions to an untimely collateral petition should render it otherwise "properly filed," notwithstanding the state court's finding of untimeliness and notwithstanding the fact that the statutory exceptions may not even compel substantive review—would sound the death-knell for the AEDPA's statute of limitations.

The Seventh Circuit's opinion in *Rice*, and its complementary disregard for the Illinois courts' interpretation of Illinois Post-Conviction Hearing act, effectively turn federalism on its head by discouraging future habeas petitioners from diligently complying with state procedural rules in the post-conviction arena. The Seventh Circuit's opinion also further diminishes the potency of the AEDPA, which was intended to winnow out habeas applicants, like Rice, who fail to pursue diligently their state remedies in accordance with state law. Quite simply, the "statutory exception" referred to by this Court in footnote 2 of *Artuz* has been seized upon by the Seventh Circuit to further water-down the vitality of the AEDPA and its attendant concerns of comity, federalism, and deference to state court adjudications. The faulty and cursory reasoning behind the Seventh Circuit's decision in *Rice* is a clear indication that *certiorari* should be granted to clarify to what extent those statutory exceptions can confer "properly filed" status on collateral petitions that are otherwise untimely under state law.

II.

Certiorari Should Be Granted Because the Seventh Circuit's Decision Finding That State Post-Conviction Petition Was "Properly Filed" Is In Conflict With This Court's Decision In *Harris v. Reed*, 489 U.S. 255 (1989).

In the District Court, Bowen argued that, in light of the appellate court's equally dispositive finding that the petition was untimely, it was, therefore, not "properly filed" under the AEDPA as that clause was interpreted in *Artuz v. Bennett*, 531 U.S. 4 (2000), and could not toll the one-year statute of limitations for filing a timely habeas petition. 28 U.S.C. §2244(d)(2). While the District Court agreed with Bowen's argument and granted his motion to dismiss, the Seventh Circuit did not, as it disregarded the state appellate court's holding that Rice's petition for post-conviction relief was untimely because the state court's holding on untimeliness was "only" made in the alternative. *Rice v. Bowen*, ___ F.3d ___ (7th Cir. 2001), 2001 U.S.App.LEXIS 14842, *8.

The Seventh Circuit's view of the appellate court's timeliness inquiry constituted a blatant deviation from this Court's procedural default jurisprudence and requires further review. When a state court makes adjudications on both the merits and the procedural posture of a claim, federal review will be foreclosed and the default will control the future disposition of the claim in federal habeas court, as long as the state court's procedural ruling was "clearly and expressly" made. *Harris v. Reed*, 489 U.S. 255, 266 (1989). This rule is grounded in concerns of comity and federalism, which prevent a habeas petitioner whose "custody was supported by independent and adequate state grounds . . . a means to undermine

the State's interest in enforcing its laws." *Coleman v. Thompson*, 501 U.S. 729, 730-731 (1991).

Before its decision in *Rice*, the Seventh Circuit's extension of the *Harris* principle to the AEDPA's "properly filed" language was grounded in the dual concerns of comity and federalism, and was consistently applied. *See Freeman v. Page*, 208 F.3d 572, 574 (7th Cir. 2000) ("Whether a collateral attack is properly filed can be determined in a straightforward way by looking at how the state courts treated it"); *Fernandez v. Sternes*, 227 F.3d 977, 978 (7th Cir. 2000) (where state court offers alternative holdings on timeliness, *Harris* should guide any analysis in federal court because that case "provide[s] a straightforward way for identifying 'properly filed' petitions"); *Jefferson v. Welborn*, 222 F.3d 286, 288 (7th Cir. 2000) (same). As illustrated by the aforementioned cases, the Seventh Circuit was steadfast in its determination that a state court's finding of procedural deficiency will be dispositive not only in the procedural default context, but also when determining whether a petition for post-conviction relief has been "properly filed" under state law. In *Rice*, however, the Seventh Circuit neglected to follow the rule established by this Court in *Harris*, holding instead that the finding of untimeliness was made "only in the alternative," and could not, therefore, support Bowen's position that the post-conviction petition was not "properly filed" for purposes of tolling the AEDPA's statute of limitations. *Rice*, 2001 U.S.App.LEXIS 14842 at *8.

Not only was this decision contrary to the spirit of *Harris*, but it also disregarded this Court's unyielding admonition that the federal courts should honor findings of procedural non-compliance which are made by state courts pursuant to state law grounds. *See, e.g., Coleman*,

501 U.S. at 729. Upon application of *Harris* to the appellate court's treatment of Rice's petition for post-conviction relief, it is apparent that the petition was not "properly filed" for purposes of tolling the AEDPA's statute of limitations. Although the state appellate court initially considered the merits of Rice's claims, it nevertheless, in the end, determined that the original post-conviction petition was filed in violation of the state statute of limitations. In short, the court's initial holding on the merits, under *Harris*, matters very little in light of its eventual unambiguous, clear, and express determination that the petition was also time-barred. *Harris* makes equally clear that the state appellate court's procedural holding was dispositive for purposes of Rice's compliance with the AEDPA's "properly filed" requirement. Rice's post-conviction petition was not "properly filed" because the state appellate court, unambiguously relying on a state statute of limitations, determined that it was untimely, notwithstanding its contemporaneous holding that the petition was without merit.

If a state court's decision rests on both a procedural default and a lack of merit, then federal review is foreclosed, provided that the finding of default is clear. *Harris*, 489 U.S. at 264, n. 10. There is no rational reason why such a default rule should not also apply to a case such as Rice's, where the state reviewing court initially denied the appeal on the merits, and, in an equally compelling holding, concluded that the petition was time-barred under state law. The purpose of the rule of comity is to "reduce friction between the state and federal court systems by avoiding the 'unseemliness' of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the

first instance." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). This same sort of "unseemliness" is equally apparent where a federal court ignores a state court's determination that a state petition for post-conviction relief does not comply with state procedural requirements, and holds instead that the application was "properly filed" for purposes of tolling the AEDPA.

The *Rice* court, instead of deferring to state law and, in turn, reducing the friction between state and federal courts, has enhanced that friction by disregarding the state appellate court's clear finding of untimeliness, and by allowing Rice to toll the AEDPA with that untimely pleading. The relentless movement toward deference to state court adjudications, whether procedural or substantive, is evident not only in Congress' passage of the AEDPA, but also in the pattern of this Court's habeas corpus jurisprudence. *See, e.g., Williams v. Taylor*, 529 U.S. 362 (2000); *Ramdass v. Angelone*, 530 U.S. 156 (2000). Comity and federalism are the watchwords in this movement toward a more deferential view of state court adjudications. In the Seventh Circuit, such concerns are no longer paramount, inasmuch as that court has created needless confusion with respect to its inconsistent and incorrect application of *Harris* to the case at bar. Therefore, *certiorari* should be granted to clarify and enforce the applicability of *Harris*, and its attendant concerns of comity and federalism, to the "properly filed" requirement contained in 28 U.S.C. §2244(d)(2).

CONCLUSION

For the aforementioned reasons, Petitioner, Edwin Bowen, respectfully requests that this Court find that (1) the Seventh Circuit's conclusions regarding the utility of statutory exceptions to timely state collateral petitions are so contrary to federalism and the intent and purpose of the AEDPA's statute of limitations so as to compel the Court to grant *certiorari* either by plenary consideration or summary reversal; and (2) the Seventh Circuit's opinion strays so far from the principles of federalism in its disregard of the state appellate court's alternative finding that Rice's state post-conviction petition was untimely under state law that this Court must grant *certiorari* either by plenary consideration or summary reversal.

Respectfully submitted,

JAMES E. RYAN
Attorney General of Illinois

JOEL D. BERTOCCHI
Solicitor General of Illinois

WILLIAM L. BROWERS
Counsel of Record
DAVID H. ISKOWICH
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5643

Counsel for Petitioner

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-4034

KEVIN RICE,

Petitioner-Appellant,

v.

EDWIN R. BOWEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 00 C 3997—**Suzanne B. Conlon**, *Judge.*

SUBMITTED MAY 18, 2001—DECIDED JUNE 28, 2001*

Before BAUER, DIANE P. WOOD, and EVANS, *Circuit Judges.*

PER CURIAM. Inmate Kevin Rice, who is serving a state sentence for drug offenses, brought a petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court dismissed, and Rice filed this appeal. Before us now is the State of Illinois's motion to strike Rice's brief because Rice allegedly has referred to a transcript that is not part of the record on appeal. As we explain in this opinion, we deny the motion as moot because under the circumstances we must

---

* This decision was initially decided per unpublished order (Circuit Rule 53).

vacate the judgment and remand this case to the district court for further proceedings.

A summary of the complex procedural history of this case is essential to understand why this step is the appropriate one. Chicago police discovered Rice and co-defendant Raymond Pugh in possession of 103 grams of heroin after a traffic stop. The two men were charged with possession of narcotics with intent to distribute and tried together in 1992. The arresting officer testified that he observed Rice hand Pugh a paper bag containing the drugs. Yet at an earlier suppression hearing Pugh had testified that he placed the bag in his underwear two hours before the traffic stop and that he kept it there at all times until the police discovered it. At trial, Rice denied possessing the drugs and called Pugh as a witness. When Pugh asserted his Fifth Amendment privilege, Rice sought to admit Pugh's testimony from the suppression hearing. The trial court, however, refused to do so on the ground that it was hearsay and not sufficiently trustworthy. Rice was convicted and sentenced to a 20-year prison term. Rice appealed, but after an initial victory in the Illinois appellate court, a divided Illinois Supreme Court reinstated his conviction. It concluded that the testimony was properly excluded under the state's evidentiary rules, and that the exclusion of the evidence did not violate Rice's due process rights under the rule announced in *Chambers v. Mississippi*, 410 U.S. 284 (1973). *See People v. Rice*, 651 N.E.2d 1083 (Ill. 1995). Rice's conviction became final on June 4, 1997, after the appellate court rejected Rice's remaining arguments and the supreme court denied further review.

In September 1996, Rice filed a petition for post-conviction relief in the trial court. Although his direct appeal was still pending, Rice was not entitled to wait until its conclusion because the version of the Illinois Post-Conviction Hearing Act that applied to him—enacted after his conviction but made retroactive, *see People v. Bates*, 529 N.E.2d

227 (Ill. 1988)—had shortened the time period to file his petition, requiring that he file his petition no later than three years from the date of conviction, or by April 12, 1995. *See* 725 ILCS 5/122-1 (West 1995); *Freeman v. Page*, 208 F.3d 572, 575 (7th Cir. 2000). Under the amendment's terms, Rice's petition was due *before* the new law took effect. To avoid placing people in an impossible situation, the amendment allowed courts to excuse the limitations period if the delay in filing was not due to "culpable negligence." *See Bates*, 529 N.E.2d at 229-30; *Barksdale v. Lane*, 957 F.2d 379, 382 n.9 (7th Cir. 1992).

Rice filed his petition fourteen months late and did not allege lack of culpable negligence. Nevertheless, the trial court, without directing the state to respond, summarily dismissed it on its merits in February 1997. On appeal, the state asserted for the first time that Rice's petition was untimely. Rice argued in reply that the court should not entertain the state's timeliness argument in the first instance, or, in the alternative, that it should remand for the trial court to determine whether the limitations period should be excused. The court affirmed, holding that the trial court properly dismissed the petition on its merits and alternatively that it was untimely.

On June 30, 2000, Rice filed his federal habeas corpus petition raising the *Chambers* issue and several others. The state immediately moved to dismiss it as time-barred. State prisoners must file their habeas corpus petitions within one year after their convictions become final, 28 U.S.C. § 2244(d)(1)(A), and Rice's conviction became final on June 4, 1997, when his direct appeal concluded. The limitations period is tolled, however, during the time in which a "properly filed" application for state post-conviction review is pending. 28 U.S.C. § 2244(d)(2). The Illinois Supreme Court did not finally dispose of Rice's state post-conviction petition until October 16, 1999, well less than a year before Rice filed his § 2254 petition.

The state argued that it was improper to rely on the October 16, 1999, date because the Illinois appellate court had found that Rice's post-conviction petition was untimely and thus not "properly filed." The district court agreed, dismissed Rice's petition, and declined to issue a certificate of appealability. But there is more to the story than that. This court granted a certificate of appealability, indicating that the district court had erred with respect to the timeliness issue and directing the parties to address whether the exclusion of Pugh's testimony conflicted with *Chambers v. Mississippi*. In support of his case, Rice quoted extensively from the suppression hearing transcript in his brief; this is the material to which the state's present motion objects.

Now that we have had a better opportunity to examine this case, it is apparent that the root of the problem with Rice's brief lies in the fact that the early ruling based on timeliness prevented proper development of the record on the constitutional issue. It is true that it is improper to cite evidence outside of the appellate record in a brief, and that such an action may justify striking the brief. *Henn v. National Geographic Soc'y*, 819 F.2d 824, 831 (7th Cir. 1987). But this case is unusual, and we believe that further explanation of our conclusion with respect to timeliness is in order. Questions of timeliness are statutory, and so errors in treating a collateral attack as untimely cannot by themselves support a certificate of appealability, which can issue only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Owens v. Boyd*, 235 F.3d 356, 357-58 (7th Cir. 2001). To review statutory errors, a judge must conclude that at least one of the prisoner's underlying constitutional claims is itself substantial, grant a certificate of appealability on that claim, and append the statutory claim as an antecedent issue to be resolved on appeal, even if the petition was denied without reaching the constitutional claim. *Owens*, 235 F.3d at 358. That is what happened here.

Addressing that antecedent question first, we concluded that Rice's habeas corpus petition was not time-barred. A petition for state post-conviction relief is properly filed for tolling purposes under 28 U.S.C. § 2244(d)(2) if it is delivered to, and accepted by, the appropriate court officer for placement in the official record, and its delivery and acceptance are in compliance with the applicable state laws and rules governing filings. *Artuz v. Bennett*, 121 S. Ct. 361, 363-64 (2000). Applicable state law and rules governing filings include time limits for delivery. *Id.* at 364; *see also Freeman*, 208 F.3d at 574 (collecting cases). We determine whether a post-conviction petition is properly filed by looking at how the state courts treated it. If the courts considered the claim on the merits, it was properly filed; if they dismissed it for procedural flaws such as untimeliness, then it was not properly filed. *Freeman*, 208 F.3d at 576. Here, the state trial court dismissed Rice's petition wholly on its merits. The appellate court likewise reviewed and affirmed the trial court's decision on the merits, holding only in the alternative that Rice's petition was not timely. *Cf. Jenkins v. Nelson*, 157 F.3d 485, 491 (7th Cir. 1998) (state procedural default cannot bar consideration of a federal claim on habeas corpus review unless the last state court rendering a judgment clearly and expressly states that its judgment rests on the procedural bar). Rice's post-conviction petition was therefore properly filed for tolling purposes.

Other circuits have also held that if a state's rule governing the timely commencement of post-conviction proceedings contains exceptions requiring courts to examine the merits of the petition before dismissing it, the petition, even if ultimately held to be time-barred, should be regarded as properly filed. *See Dictado v. Ducharme*, 244 F.3d 724, 727-28 (9th Cir. 2001); *Emerson v. Johnson*, 243 F.3d 931, 935 (5th Cir. 2001); *Smith v. Ward*, 209 F.3d 383, 385 (5th Cir. 2000). Illinois provides a statutory exception to its post-conviction time limitation if "the petitioner alleges facts showing that the delay was not due to his or her culpable negli-

gence." 725 ILCS 5/122-1(c). Under the circumstances, the state courts had to consider the merits of Rice's petition before determining whether it was timely. In addition, Illinois has directed its courts summarily to dismiss frivolous or patently meritless post-conviction petitions. 725 ILCS 2[sic]/112[sic]-2.1(a)(2). Frivolousness was the reason the state court gave for dismissing Rice's petition, and this, too, is a merits determination.

Because the district court's conclusion with respect to timeliness had the effect of cutting off further development of the record and issues there, we have decided that the proper step is to remand the case to that court for further proceedings. This will give us the benefit of both the district court's views on the issue and a proper record on which to base our review of Rice's *Chambers* claim. We note in this connection that the district court's statement that the *Chambers* claim was not cognizable on habeas corpus review because it was an error involving the application of state law was not necessarily correct. In some cases—though we express no view about whether this is one—mechanistic application of state evidentiary rules may deprive criminal defendants of a fair trial. *Chambers*, 410 U.S. at 302-03.

Accordingly, the judgment of the district court is VACATED, and this case is REMANDED to the district court for further proceedings consistent with this order. The motion to strike Rice's brief is DENIED as moot.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

App. 7

[Dated September 29, 2000]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS, EASTERN DIVISION

No. 00 C 3997

United State [sic] of America ex rel. KEVIN RICE, Plaintiff, v. RONALD HAWS, Warden, Defendant.

MEMORANDUM OPINION AND ORDER

Kevin Rice petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Rice names Warden Ronald Haws as respondent. Respondent informed the court in its response brief that Haws has been replaced by Edwin Bowen as warden of the Centralia Correction [sic] Center. Therefore, pursuant to Rule 2(a) of the Rules governing § 2254 cases, Warden Bowen is substituted as the respondent.

BACKGROUND

The factual findings of a state trial or appellate court are presumed true in a federal habeas proceeding unless the petitioner rebuts the presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). As there is no evidence before the court to rebut this presumption, the court adopts the Illinois appellate court's statement of facts. *People v. Rice*, 247 Ill. App. 3d 415 (Ill.App. 1993).

In 1992, Rice was convicted of possession of heroin in the Circuit Court of Cook County, Illinois. He was sen-

tenced to a prison term of 20 years. On May 27, 1993, the Illinois appellate court reversed because the trial court excluded statements by Rice's co-defendant that were against his penal interest at a suppression hearing. On April 20, 1995, the Illinois Supreme Court reversed and remanded, finding the trial court did not err in excluding the testimony at Rice's trial because the state did not have an adequate opportunity to cross-examine Rice's co-defendant at the suppression hearing. *People v. Rice*, 166 Ill. 2d 35 (Ill.1995). On December 30, 1996, the appellate court affirmed all remaining issues. *People v. Rice*, 286 Ill. App. 3d 394 (Ill.App. 1996). Rice filed a petition for leave to appeal to the Illinois Supreme Court, which was denied on June 4, 1997. *People v. Rice*, No. 82941 (Ill. 1997). Resp. Br., Ex. G.

While pursuing his direct appeal, Rice also filed a post-conviction petition in the Circuit Court of Cook County on September 12, 1996. On February 26, 1997, the trial court summarily dismissed the petition as frivolous and without merit pursuant to 725 ILCS 5/122-2.1. *People v. Rice*, No. 89 CR 16842. Resp. Br., Ex. H. The dismissal was affirmed by the appellate court on May 17, 1999. *People v. Rice*, No. 1-97-1181. *Id.* at Ex. K. That opinion concluded, *inter alia*, that the post-conviction petition was untimely filed. This issue was not briefed by the parties at the trial court level because the petition was summarily dismissed by the trial judge without awaiting a response by the state. Rice's appeal of this decision to the Illinois Supreme Court was denied on October 6, 1999. *People v. Rice*, No. 87765. *Id.* at Ex. M.

Rice originally filed his habeas petition in this court on November 13, 1997. *Rice v. Haws*, No. 97 C 7908 (N.D. Ill. 1997) (Conlon, J.). The petition was dismissed without prejudice for failure to exhaust state remedies. On

May 9, 2000, Rice moved to "renew" his habeas petition before this court. The court struck the renewed petition and supporting memorandum, suggesting that Rice file a new petition.

On June 30, 2000, Rice filed this petition for a writ of habeas corpus. *Rice v. Haws*, No. 00 C 3997. The petition alleges various errors in Rice's trial: exclusion of exculpatory evidence, improper jury instructions, and refusal to grant a severance of the co-defendants. It also alleges that the prosecutors failed to provide exculpatory evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Bowen moves to dismiss the petition as time-barred under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

DISCUSSION

I AEDPA's statute of limitations

Before this court reaches the merits of Rice's petition for a writ of habeas corpus, it must first determine whether the petition was timely filed. The AEDPA amended 28 U.S.C. § 2244 and placed a one-year statute of limitations on the filing of a habeas corpus petition under § 2254. The one-year limitations period, with certain exceptions not applicable to this case, begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). When no petition for a writ of *certiorari* is filed with the Supreme Court, a judgment becomes final for the purposes of § 2244(d)(1)(A) when the time for filing the petition expires. *United States ex. [sic] rel. Gonzalez v. DeTella*, 6 F. Supp. 2d 780, 781 (N.D.Ill. 1999) (*rev'd on*

other grounds). Under Supreme Court Rule 13, the time for filing expires 90 days after the entry of judgment to be reviewed. Therefore, the judgment in Rice's case became final, and the statute of limitations began to accrue, on September 3, 1997—90 days after the Illinois Supreme Court denied Rice leave to appeal on June 4, 1997.

Thus, the one-year statute of limitations for Rice to file a habeas petition expired on September 3, 1998, unless the statute of limitations was tolled. Rice filed his current habeas petition on June 30, 2000, well after the statute of limitations expired. Therefore, if the statute of limitations was not tolled, Rice's petition is time-barred.

II Tolling of statute of limitations

1. The effect of state post-conviction filings

Under the AEDPA, "the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). Rice filed a post-conviction petition on September 12, 1996. His post-conviction proceedings concluded on October 6, 1999. Therefore, if the application for state post-conviction relief was "properly filed," the June 30, 2000 filing would be within the one-year statute of limitations.

a. The state post-conviction petition

A post-conviction petition that is untimely under Illinois law is not "properly filed" within the meaning of

§ 2244(d)(2). *Freeman v. Page*, 208 F.3d 572, 574 (7th Cir. 2000). The Illinois appellate court dismissed Rice's post-conviction petition because, *inter alia*, it was untimely.[1] Resp. Br., Ex. K at 8. The Illinois Supreme Court denied Rice's appeal of this decision. *Id.* at Ex. M. Therefore, Rice's petition was not properly filed, and his one-year statute of limitations was not tolled.

Rice argues this court should treat his petition as timely despite the state courts' resolution of the state-law dispute. He argues that this court should review *de novo* the state courts' determinations that the post-conviction petition was untimely. However, the state courts' decisions as to whether a post-conviction petition is properly filed is a matter of state law that is binding on the reviewing federal court. *Freeman*, 208 F.3d at 575.

Rice argues *Freeman* does not apply to him because, unlike the defendant in that case, he never had an opportunity to litigate the timeliness of the state post-conviction petition before the state courts. This argument fails because Rice did have the opportunity to litigate this issue in state court. The state first raised the issue before the Illinois appellate court. Rice had the opportunity to respond to the argument in his appellate brief. Moreover, Rice took advantage of this opportunity and addressed the state's timeliness argument. He argued to the appellate court that the state waived its

---

[1] The court dismissed Rice's petition under 725 ILCS 5/122-1, which provides that the time limit for filing a post-conviction petition is six months after denial of a petition for leave to appeal or issuance of an Illinois Supreme Court opinion; or three years after the date of conviction, whichever is later. These time limitations apply unless the petitioner alleges facts showing that the delay was not due to his culpable negligence.

timeliness argument, and that the delay in filing the petition was not due to Rice's culpable negligence, but rather to his attorney's mistake. Resp. Br., Ex. N, p. [sic] 4-8. The appellate court rejected Rice's argument that the state waived its timeliness objection. *Id.* at Ex. K, p. 10. The state appellate court also rejected Rice's argument that the delay was not due to his culpable negligence. *Id.* at p. 11. Rice appealed these decisions to the Illinois Supreme Court, which rejected his petition for leave to appeal. *Id.* at Ex. M. Rice's argument that he did not have an opportunity to litigate the state courts' rejection of his petition as untimely is without a basis in the record.

b. Due process right to an evidentiary hearing

Rice argues his right to due process under the Fourteenth Amendment was violated when the state refused to grant him an evidentiary hearing on the issue of whether his state post-conviction petition was timely filed. This argument must fail. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *McKenzie v. City of Chicago*, 118 F.3d 552, 557 (7th Cir. 1997). Rice was given the opportunity, and used that opportunity, to argue his claims of waiver and culpable negligence to the state appellate court. The appellate court considered Rice's claims and rejected them. The state courts' procedure did not violate Rice's due process rights.

Rice also argues that he is entitled to an evidentiary hearing before this court. *Burris v. Parke*, 116 F.3d 256, 259 (7th Cir. 1997); *Berry v. Gramley*, 74 F. Supp. 2d 808, 809 at n.1 (N.D.Ill. 1999). This argument lacks

merit. A federal hearing is required only when the habeas petitioner has alleged facts that, if proved, would entitle him to relief. *Porter v. Gramley*, 112 F.3d 1308, 1314 (7th Cir. 1997) (citing *Townsend v. Sain*, 372 U.S. 293 (1963)). Rice has not alleged facts that would entitle him to relief. Rice alleges that the state court incorrectly ruled that his post-conviction petition was not timely filed. This is a question of state law. Perceived errors of state law are not cognizable on federal habeas review. *Pulley v. Harris*, 465 U.S. 37, 41 (1984).

c. Due process right to present a defense

Rice argues that his due process right to present a valid defense was violated when the state court refused to conduct a hearing on the issue whether his post-conviction petition was not time-barred, citing *People v. Moore*, 133 Ill. 2d 331 (Ill. 1990); *People v. Keeney*, 45 Ill. 2d 280 (Ill. 1970); *Rodriguez v. United States*, 395 U.S. 327 (1969); *Lozada v. Deeds*, 498 U.S. 430 (1991); *Bell v. Lockhart*, 795 F.2d 655 (8th Cir. 1986). None of these cases is applicable here. Each case relates to an attorney's error on direct appeal. The error by Rice's attorney was made on collateral review. Due process does not prevent this error from foreclosing his appeal on statute of limitations grounds. *See Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991). Further, Rice was given an opportunity to present his defense on the untimeliness argument in his brief to the Illinois appellate court.

d. Waiver of the state's timeliness argument

Rice argues that the state waived its untimeliness objection and therefore his petition should be treated as

timely. This argument lacks merit. The state appellate court explicitly rejected Rice's argument that the state waived its untimeliness objection. Resp. Br., Ex. K, p. 9. The Illinois Supreme Court denied leave to appeal. *Id.* at Ex. M. This court is bound by the Illinois appellate court's interpretation of state law as to whether the untimeliness argument was waived. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Freeman*, 208 F.3d at 575. This is not a proper claim for habeas review. *Pulley*, 465 U.S. at 41.

e. Constitutionality of 725 ILCS 5/122-1(c)

Finally, Rice argues that the Illinois post-conviction hearing statute, 725 ILCS 5/122-1(c), violates his Fourteenth Amendment rights to due process and equal protection because it irrationally treats identically-situated prisoners differently. This argument is frivolous.

The portion of 725 ILCS 5/122-1 challenged provides:

> (c) No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed . . . or 3 years from the date of conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.

Rice argues that this provision violates due process because defendants who file a direct appeal must file a post-conviction petition within six months after denial of leave to appeal, but defendants who do not file a direct appeal have three years from the date of their conviction to file a post-conviction petition. Rice argues that this

provision irrationally treats identically-situated individuals differently.

Rice has not argued that the challenged provision involves a suspect class or a fundamental right. Therefore, in order to establish that this provision violates the equal protection or due process clauses of the Fourteenth Amendment,[2] Rice must show there is no rational relationship between the classification in the statute and a legitimate government purpose. *Heller v. Doe*, 509 U.S. 312, 320 (1993). A statute is presumed constitutional and the burden is on the one attacking the legislative provision to negative any conceivable basis that might support it. *Id.* at 320-21.

Rice has not met this burden. He alleges that the statute treats identically-situated individuals differently. However, the individuals treated differently by the statute are not identical. One group has chosen to pursue a direct appeal, while the other has not. Rice further argues that the different treatment of these two groups is irrational. Without presuming to know why the Illinois legislature chose to make the distinction it did, there are many rational reasons upon which a distinction may be made between individuals who have chosen to pursue a direct appeal and those who have chosen not to.[3] Choosing to pursue a direct appeal consumes state time and resources, and provides a defendant with an

---

[2] The standard for validity is the same under either clause. *Turner v. Glickman*, 207 F.3d 419, 424, 426 (7th Cir. 2000).

[3] "It is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *FCC v. Beach Comm., Inc.*, 508 U.S. 307, 315 (1993).

opportunity for judicial review. Allowing those who do not file a direct appeal a longer period to seek post-conviction collateral relief is rational. This is only one potential basis upon which the legislation may have been founded, but it is enough. *Id.* at 319 (classification must be upheld if any reasonable conceivable state of facts could provide rational basis for classification). Rice's argument that 725 ILCS 5/122-1(c) violates due process and equal protection must be rejected.

2. The original federal habeas corpus petition

Rice originally filed a habeas petition with this court on November 13, 1997. This petition was dismissed without prejudice for failure to exhaust state remedies. Dismissal of Rice's petition, rather than staying the petition until state remedies were exhausted, was proper. *Slack v. McDaniel*, 120 S. Ct. 1595, 1606 (2000); *Heck v. Humphrey*, 997 F.2d 355, 357 (7th Cir. 1993) (dismissal proper even if dismissal will lead to a defense of statute of limitations upon re-filing). Rice's filing of a previous habeas petition did not toll the statute of limitations for the current petition. *Slack*, 120 S. Ct. at 1606 (petition filed after a previous petition was dismissed on exhaustion grounds is treated as a first petition); *Heck*, 997 F.2d at 357. Rice's only potential recourse is the doctrine of equitable tolling. *Id.*

3. Equitable tolling

The AEDPA [sic] one-year statute of limitations is subject to equitable tolling. *Taliani v. Chrans*, 189 F.3d 597 (7th Cir. 1999). Under this doctrine, Rice's failure to file his habeas petition within the limitations period may

be excused only if he shows that he "could not, despite the exercise of reasonable diligence, have discovered all the information he needed in order to be able to file his claim on time." *Id.* at 597-98. In other words, "[e]xtraordinary circumstances far beyond the litigant's control must have prevented timely filing." *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. May 15, 2000). Equitable tolling is granted sparingly. *Id.* (citing *Irwin v. Dep. of Veterans Affairs*, 498 U.S. 89, 96 (1990)).

Rice has not proffered any conditions that entitle him to equitable tolling. Rice possessed all the necessary information to file a habeas corpus petition prior to expiration of the statute of limitations. No allegation of circumstances beyond Rice's control that preventing [sic] his timely filing have been advanced.

Rice's contention that the state waived its statute of limitations defense is not a ground for equitable tolling. Equitable tolling is concerned with whether Rice exercised reasonable diligence in the pursuit of his claim. *Taliani*, 189 F.3d at 597. Rice's argument is irrelevant to the question whether he was diligent in filing his post-conviction petition.

Rice contends the state petition was untimely filed due to the error of counsel as a basis for equitable tolling. "A lawyer's mistake is not a valid basis for equitable tolling." *Taliani*, 189 F.3d at 598. "The petitioner bears the risk in federal habeas for all attorney errors made in the course of representation," because "the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation." *Coleman*, 501 U.S. at 753-54.

Finally, the fact that Rice filed a habeas petition with this court on November 13, 1997, does not establish a

basis for equitable tolling. The Seventh Circuit has allowed for the possibility of equitable tolling where an original habeas petition is dismissed and a new habeas petition is barred by the statute of limitations. *Heck*, 997 F.2d at 357. However, in order to invoke equitable estoppel in this situation, a petitioner must "proceed with due diligence to exhaust his state remedies and to file the renewed [habeas] suit as soon as possible afterward." *Id.* at 358. Rice has failed to satisfy this requirement. Rice failed to pursue his state claims with due diligence. He filed his post-conviction appeal in the Illinois appellate court 13 months after the trial judge dismissed the post-conviction petition.[4] The appellate court then affirmed the dismissal of Rice's post-conviction petition as untimely.

In addition, Rice failed to pursue his federal claims with due diligence. Though he filed a habeas petition on November 13, 1997, this filing did not toll the statute of limitations. Even if Rice believed that this filing tolled the statute of limitations, an erroneous belief would not justify equitable tolling. *See United States v. Griffin*, 58 F. Supp. 2d 863, 868 (N.D.Ill. 1999) (claim of ignorance of the law not sufficient to warrant equitable tolling). At the very least, Rice should have filed a habeas petition immediately after the Illinois Supreme Court rejected his final post-conviction appeal on October 6, 1999. Instead, Rice did not file this habeas petition until June

---

[4] The trial court dismissed Rice's claims on February 26, 1997; Rice filed his state appeal from this decision on March 20, 1998.

30, 2000, nearly nine months later.[5]

Rice's failure to pursue his state and federal claims with due diligence is further evidenced by the fact that Rice was represented by counsel throughout his post-conviction proceedings, in both federal and state court. This is not the case of an unwary *pro se* prisoner caught in an interjurisdictional procedural web. Rice's attorney should be well aware of the procedural aspects of post-conviction proceedings. He failed to follow them. This failure must be attributed to Rice. His attorney acted as his agent in all post-conviction proceedings. *Marcello*, 212 F.3d at 1010.[6]

III Merits of Rice's claims

Even if this court were to consider Rice's petition on the merits, it does not appear that there is any merit to his claims. Most of Rice's habeas claims are based on purported errors by the trial court involving application of state law. Rice contends that the trial court improperly excluded exculpatory evidence [Count 1]. He asserts that the trial court erred in its opening jury instructions [Count 2], as well as its closing jury instruc-

---

[5] Rice filed an inappropriate motion to "renew" his original habeas petition on May 9, 2000, seven months after his post-conviction proceedings were exhausted.

[6] *Marcello* demonstrates that one's circumstances must be extraordinary in order for equitable tolling to apply. In that case, the habeas petition was filed one day after the filing deadline because, *inter alia*, the attorney's father had just passed away. Equitable tolling for one day was not granted. *Id.* at 1010.

tions [Counts 3 and 4]. He further argues that the trial court improperly denied a severance between Rice and a co-defendant [Count 5]. He fails to establish that these purported trial errors raise a constitutional basis for habeas review. *Brecht v. Abrahamson*, 944 F.2d 1363, 1374 (7th Cir. 1991); *Gilmore v. Taylor*, 508 U.S. 333, 344 (1993).

In addition, Rice claims the prosecution did not turn over material adversely affecting a prosecution witness' credibility, in violation of *Brady v. Maryland*. He asserts that Officer Drozd, the prosecution's eyewitness, had a drinking problem and that while undercover Drozd consorted with members of a rival gang. Rice requested information of "rumors" he had heard about Officer Drozd. The prosecution responded that it did not have "rumor" information. Rice speculates the prosecution had "rumor" information, and claims he is entitled to discovery to determine whether a *Brady* violation occurred. Rice clearly has no evidence of a *Brady* violation. Moreover, Rice must show that there is a reasonable probability that "rumor" information would be admissible evidence that would have affected the result at trial. *United States v. Bagley*, 473 U.S. 667, 682 (1985). He must also show prejudice due to the violation. *United States v. Cruz-Velasco*, ___ F.3d ___, 2000 WL 1160859 (7th Cir. Aug. 17, 2000). Prejudice exists when the defendant "is unduly surprised and lacks an adequate opportunity to prepare a defense, or when the violation substantially influences the jury." *Id.* Rice has not met this burden.

CONCLUSION

The petition ro [sic] a write [sic] of habeas corpus is denied.

ENTER:

Suzanne B. Conlon
United States District Judge

September 29, 2000

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

August 2, 2001

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

KEVIN RICE,

Petitioner-Appellant,

No. 00-4034 *v.*

EDWIN R. BOWEN, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 00 C 3997—**Suzanne B. Conlon**, *Judge*.

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* filed by counsel for the respondent-appellee on July 11, 2001, all members of the original panel have voted to **Deny** the petition. No judge in regular active service requested a vote on petition for rehearing *en banc*.

Accordingly, the petition for rehearing is hereby **Denied**.

Supreme Court, U.S.
FILED
FEB 26 2002
OFFICE OF THE CLERK

No. 01-873

In the

Supreme Court of the United States

EDWIN R. BOWEN, WARDEN,

Petitioner,

v.

KEVIN RICE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JAMES E. RYAN
Attorney General of Illinois

JOEL D. BERTOCCHI
Solicitor General of Illinois

WILLIAM L. BROWERS
Counsel of Record
DAVID H. ISKOWICH
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5643

Counsel for Petitioner

Printed by Authority of the State of Illinois (P.O. 29451—50—2-26-02)

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT'S RECENT DECISION IN *BROOKS v. WALLS* LENDS FURTHER SUPPORT TO PETITIONER'S VIEW THAT *CERTIORARI* IS WARRANTED IN THE CASE AT BAR.

In light of a recent case decided by the United States Court of Appeals for the Seventh Circuit, Petitioner Edwin Bowen (Bowen) submits this Supplemental Brief in Support of his Petition for Writ of *Certiorari* pursuant to United States Supreme Court Rule 15(8). As this Court will recall, Bowen, in his petition for writ of *certiorari* filed in this Court on October 30, 2001, argued that the Seventh Circuit's decision in *Rice v. Bowen*, 264 F.3d 698 (7th Cir. 2001), conflicted with this Court's decision in *Artuz v. Bennett*, 531 U.S. 4 (2000), and, in particular, rendered an unreasonable interpretation of that case's footnote concerning the effect of state statutory exceptions to untimely state post-conviction petitions, and that *certiorari* was necessary to correct and instruct the Seventh Circuit with respect to the tolling utility of such exceptions. Bowen also argued that the *Rice* panel ignored this Court's decision in *Harris v. Reed*, 489 U.S. 255 (1989), concerning the effect of alternative holdings in the realm of procedural default, and that the decision strayed from the *Harris* caveat that procedural dispositions made by state courts should not be ignored, notwithstanding a contemporaneous holding on the merits of the claim.

The Seventh Circuit's recent decision in *Brooks v. Cowan*, ___ F.3d ___, 2002 U.S. App. LEXIS 1556 (7th Cir. 2002) (attached as Appendix A), strengthens the grounds upon which Bowen seeks *certiorari*. *Brooks* reveals that the Seventh Circuit's recent habeas time-bar jurisprudence is beset by such intra-circuit inconsistency that it is impossible to gauge the efficacy, in that circuit, of the AEDPA's statute of limitations in general, and of the "properly filed" tolling exception in particular. In *Brooks*, the Seventh Cir-

cuit recognized that *Rice* ignored *Harris* and made dubious use of this Court's footnote 2 in *Artuz*, where, as noted above, this Court reserved judgment on the tolling capabilities of post-conviction statutes which contain allowances for late filing. The *Brooks* court also observed that *Rice* cannot be reconciled with a pair of Seventh Circuit decisions (cited by Bowen in his petition for writ of *certiorari*) which held that, when the state court offers holdings on both the substantive merits of the claim and on the timeliness of the post-conviction petition, *Harris* should guide the federal court's treatment of such dual holdings, and the effective result being that a state court's finding of untimeliness must be respected and, accordingly, must control the federal court's determination of whether the collateral petition was "properly filed" so as to toll the AEDPA. *See Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000); *Jefferson v. Welborn*, 222 F.3d 286 (7th Cir. 2000).

The *Brooks* court expressed frustration that *Rice* is still the law of the Circuit, but did not overrule *Rice* notwithstanding (1) *Rice's* failure to acknowledge *Harris* and its attendant conflict with *Jefferson* and *Fernandez*, and (2) the implication inherent in the *Rice* decision, by virtue of Rice's interpretation of the *Artuz* footnote, that "almost every collateral attack in Illinois [will be] 'properly filed' for purposes of §2244(d)(2). . ." *Brooks*, slip opinion at 2. Even more frustrating, according to the *Brooks* court, for purposes of establishing a regular, settled pattern of time-bar jurisprudence in the Seventh Circuit, was the failure of the *Rice* panel to circulate the opinion in accordance with local rules in order to overrule *Fernandez* and *Jefferson* and their application of the *Harris* doctrine to state court decisions that implicate both a review of the merits and a finding of untimeliness.

After *Brooks*, it is evident that the Seventh Circuit is split on the utility of the Illinois Post-Conviction Hearing Act's

"lack of culpable negligence" exception, with the *Brooks* panel disavowing the view that an untimely state collateral petition, simply by virtue of that exception, tolls the AEDPA, and with the *Rice* panel holding that the Illinois exception to untimely state collateral attacks necessarily requires that the state courts review the merits, which, in turn, confers "properly filed" status on an otherwise untimely state petition. Also evident is the split regarding the role of *Harris* in such matters, with *Brooks* reaffirming its belief that the application of that decision within the AEDPA's "properly filed" context is appropriate, and with *Rice*, as *Brooks* pointed out, all but ignoring it.

At the end of the Seventh Circuit's meandering path is a labyrinth of caselaw which offers no guidance to habeas litigants, to the state, or to the lower courts. It is vital that *certiorari* be granted to resolve these questions, not just for the sake of the Seventh Circuit, but for the benefit of the other federal courts as well.

CONCLUSION

For the aforementioned reasons, as well as for those reasons already set forth in his petition for writ of *certiorari*, Petitioner, Edwin Bowen, respectfully requests that, in light of the Seventh Circuit's inconsistent time-bar jurisprudence as evidenced by its recent decision in *Brooks v. Walls*, this Court grant *certiorari* either by plenary consideration or summary reversal.

Respectfully submitted,

JAMES E. RYAN
Attorney General of Illinois

JOEL D. BERTOCCHI
Solicitor General of Illinois

WILLIAM L. BROWERS
Counsel of Record
DAVID H. ISKOWICH
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5643

Counsel for Petitioner

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-1584

LYNN BROOKS,

Petitioner-Appellant,

v.

JONATHAN R. WALLS, Warden,
Menard Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 00-4049—**Joe Billy McDade**, *Chief Judge*.

ARGUED NOVEMBER 29, 2001—DECIDED FEBRUARY 1, 2002

Before COFFEY, EASTERBROOK, and RIPPLE, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Our appeal presents a single but important question: whether the one-year period for filing federal collateral attacks on state criminal judgments, see 28 U.S.C. §2244(d), has any effect on prisoners of Illinois. Section 2244(d)(2) excludes from this year any time during which "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending". See *Artuz v. Bennett*, 531 U.S. 4 (2000). A collateral attack that is untimely under state law is not "properly filed." See *Freeman*

v. Page, 208 F.3d 572 (7th Cir. 2000). But if the state decides not to enforce its timeliness rules, and considers on the merits a petition that could have been dismissed as untimely, then we treat that petition as "properly filed" for purposes of §2244(d)(2). See *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000); *Jefferson v. Welborn*, 222 F.3d 286 (7th Cir. 2000). The complication is that Illinois permits, and may require, trial judges to cast at least a sidelong glance at the merits in order to determine whether to excuse failure to meet the deadline. See 725 ILCS 5/122-1; *People v. Wright*, 189 Ill. 2d 1, 723 N.E.2d 230 (1999); *People v. Coleman*, 183 Ill. 2d 366, 701 N.E.2d 1063 (1998). Thus any state prisoner whose delay was not caused by his own "culpable negligence" (which forecloses any consideration of an untimely filing) receives either plenary review or a judicial response along the lines of "this petition is late; and because it does not demonstrate a miscarriage of justice, I have decided not to excuse the untimeliness."

Lynn Brooks filed an untimely collateral attack and received a reply of this kind. The state's appellate court affirmed, holding expressly that Brooks' filing was untimely. Nonetheless, Brooks contends that any consideration of the merits, no matter how abbreviated, in order to determine whether to enforce the timeliness requirement, amounts to a decision *on* the merits, which means that the state judiciary considered the petition to be "properly filed" even if the state courts say that the filing was untimely or procedurally irregular in some other way. If this is so, then almost every collateral attack in Illinois is "properly filed" for purposes of §2244(d)(2), and the tolling rules in §2244(d) allow federal collateral attacks to be commenced long after the statutory year has expired. The district court held that Illinois' willingness to accept untimely filings in *some* cases does not imply that *every* filing is timely, and it dismissed Brooks' federal petition as untimely—which Brooks concedes it is, unless the time devoted to his untimely state pe-

tition is excluded by §2244(d)(2). A judge of this court issued a certificate of appealability mentioning only the statutory timeliness issue. This certificate does not satisfy 28 U.S.C. §2253(c)(2). But Brooks contends that his underlying theories of relief include at least one substantial constitutional claim, and as the state did not ask us before briefing to vacate the certificate we are entitled to address the antecedent statutory question. See *Slack v. McDaniel*, 529 U.S. 473, 483-85 (2000); *Ramunno v. United States*, 264 F.3d 723 (7th Cir. 2001).

Brooks starts from the major premise, articulated in *Freeman*, that proper filing is a matter of state law:

> Whether a collateral attack is "properly filed" can be determined in a straightforward way by looking at how the state courts treated it. If they considered the claim on the merits, it was properly filed; if they dismissed it for procedural flaws such as untimeliness, then it was not properly filed.

208 F.3d at 576. He adds the minor premise that, when deciding whether to accept an untimely filing, a state court in Illinois gives some consideration to the merits. From this consideration of the merits Brooks concludes that even an untimely petition is "properly filed" in Illinois—and even if the state court holds expressly that it was *not* timely and that the delay will not be excused.

The hidden premise of this syllogism is that when a state court decides a case on two grounds—one procedural, the other related to the merits—then the federal court ignores the procedural ground and treats the state's disposition as if it had been based wholly on the merits. Yet *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989), held otherwise for purposes of the independent-and-adequate-state-grounds doctrine. When a state ground (such as failure to make a contemporaneous objection, or to raise an issue on appeal)

supports a state court's rejection of an argument based on federal law, that federal issue cannot be raised on collateral attack unless the prisoner shows cause for, and prejudice from, that default. E.g., *Coleman v. Thompson*, 501 U.S. 722, 729-35 (1991). We explained in *Fernandez* and *Jefferson* that a decision with respect to proper filing, as a state-law procedural ground, should be treated the way *Harris* specifies for other state grounds. This means two things of particular relevance: first, that when a state court decides the merits *and* asserts a procedural bar, the federal court must respect both rulings; second, that when state courts disagree about the right ground of decision, the ruling of the last state court to articulate a reason governs. *Ylst v. Nunnemaker*, 501 U.S. 797 (1991); *Coleman, supra*. Thus if, for example, a state trial court accepts an untimely petition, but the court of appeals rules that the petition should not have been accepted and considered, it is the appellate ruling that controls. And when the last state court relies on dual grounds, the procedural ground means that the petition was not "properly filed."

Brooks recognizes that under the approach of *Harris* (adopted for §2244(d) cases by *Fernandez* and *Jefferson*) his state collateral attack was not "properly filed." The state's court of first instance relied on both a procedural ground (untimeliness) and the merits (to the extent the judge thought Brooks' substantive claim too weak to justify accepting an untimely petition). The state's court of appeals relied on the procedural ground exclusively. Nonetheless, Brooks contends, we implicitly overruled *Fernandez* and *Jefferson* (and departed from *Harris*) when holding in *Rice v. Bowen*, 264 F.3d 698 (7th Cir. 2001), that an untimely petition is "properly filed" for purposes of state law when the initial state court treats it as frivolous. A declaration of frivolousness is "on the merits," the panel noted in *Rice*. Our panel observed in *Rice* that "[o]ther circuits have . . . held that if a state's rule governing the timely commence-

ment of post-conviction proceedings contains exceptions requiring courts to examine the merits of the petition before dismissing it, the petition, even if ultimately held to be time-barred, should be regarded as properly filed." 264 F.3d at 701-02, citing *Dictado v. Ducharme*, 244 F.3d 724, 727-28 (9th Cir. 2001), and *Emerson v. Johnson*, 243 F.3d 931, 935 (5th Cir. 2001). *Dictado*, which states its position most clearly, held that when a state court gives two grounds—one procedural and resting on state-law conditions for filing, the other related to the merits of the federal claim—the procedural ground is disregarded and the petition treated as "properly filed" for purposes of §2244(d). *Dictado* did not mention *Harris*, *Fernandez*, or *Jefferson*, nor did our panel in *Rice*.

One panel of this court cannot overrule another implicitly. Overruling requires recognition of the decision to be undone and circulation to the full court under Circuit Rule 40(e). *Rice* did not propose to overrule any decision, and the panel did not circulate its opinion to the full court before release. So *Fernandez* and *Jefferson* remain the law of the circuit—and they are incompatible with *Dictado*, at least if that opinion is read broadly. A narrow reading is possible. The independent-and-adequate-state-grounds doctrine, which *Fernandez* and *Jefferson* take §2244(d)(2) to instantiate, operates only if the state ground is *independent* of the federal ground. So if, for example, a state were to provide something like "all meritorious collateral attacks are timely, but no unmeritorious collateral attack is timely," then timeliness would not be independent of the federal constitutional claim. A declaration that a given petition had been filed "too late" would represent no more than the state court's decision on the merits; and a state may not use procedural window dressing to avoid later federal collateral review. Perhaps this is what actually happened in *Rice*. But we do not think that Illinois systematically attempts to disguise resolution of the merits as a disposition of timeliness.

The limit in 725 ILCS 5/122-1 is stated in terms of days, not in terms of the merits. It lacks the merits-related exceptions that the AEDPA applies to federal courts. The year for a federal prisoner to file may be restarted if, for example, the Supreme Court renders a novel and retroactive constitutional decision. See 28 U.S.C. §2255 ¶6(3); *Ashley v. United States*, 266 F.3d 671 (7th Cir. 2001). Yet it would be fanciful to say that similar exceptions, if adopted at the state level, make *all* collateral attacks "properly filed"—even those collateral attacks that are not based on novel, retroactive developments in federal law. What Illinois has done makes even less use of federal law. The state's system seems to be modeled after the doctrine, used by state and federal courts alike, that untimely filings and other non-jurisdictional blunders in criminal cases may be disregarded in order to correct plain error. Deciding whether an error is "plain" often entails at least limited review of the merits. See *Johnson v. United States*, 520 U.S. 461 (1997); *United States v. Olano*, 507 U.S. 725 (1993). And it is settled (at least in this circuit) that a plain-error exception to a procedural rule does not compromise that rule's quality as an independent ground of decision.

Ever since *Wainwright v. Sykes*, 433 U.S. 72 (1977), federal courts have held that a defendant's failure to assert his constitutional contentions at the time, and in the manner, required by state law forfeits any entitlement to federal collateral review of those contentions, unless the defendant can show cause for and prejudice from the omission, or a miscarriage of justice. Stating the rule this way builds in a sort of plain-error exception, on top of the plain-error doctrine that states apply themselves, yet the Supreme Court does not view it as demolishing the rule by eliminating the "independence" of the procedural ground. We pointed out in *Prihoda v. McCaughtry*, 910 F.2d 1379, 1383-84 (7th Cir. 1990), that the dual-grounds rule of *Harris* is designed for these situations. A state court may say something like: "this

argument has been forfeited because not raised in the proper way (such as by an objection to the jury instructions); and the defendant has not established plain error because there was no error at all." When it does this, it has not abandoned the procedural ground but has instead added a substantive failing to the procedural one. The independent-and-adequate-state-ground doctrine is one of long lineage, founded not only in respect for state tribunals but also in recognition that litigants should be given incentives to present their contentions as soon as possible, when errors can be avoided, rather than to save them up for presentation after the error has been committed. *Sykes* is based on pragmatism as well as comity. A state does not abandon the benefits of this doctrine by allowing plain-error review—or by accepting untimely collateral attacks when the standards of plain error have been met. To the extent that *Dictado* holds that any merits-related exceptions to state timeliness rules make all state collateral attacks timely (and thus "properly filed") it is incompatible with the law established by the Supreme Court (in opinions such as *Sykes* and *Harris*) and by this circuit (in opinions such as *Prihoda*, *Fernandez*, and *Jefferson*).

The ninth circuit may well think that the broad reading of *Dictado* is the correct one, because it held in *Smith v. Stewart*, 241 F.3d 1191 (9th Cir. 2001), again without discussing *Harris*, that availability of plain-error review destroys the independence of a state's procedural ground of decision. The defendant in *Smith* failed to make a timely argument that his prior lawyer had furnished ineffective assistance of counsel, and on collateral attack the state court deemed the contention forfeited. Nonetheless, the ninth circuit held, a federal court is entitled to disregard the forfeiture and resolve the ineffective-assistance claim on the merits, because Arizona (the state in question) can consider the merits when deciding whether to enforce its forfeiture

rules. This is the same approach that the ninth circuit used in *Dictado* to determine proper filing under §2244(d)(2).

Certiorari has been granted in *Smith* and a question certified to the Supreme Court of Arizona, so that it may decide whether forfeiture and the merits are bound together as the ninth circuit believed. See *Stewart v. Smith*, No. 01-339 (U.S. Dec. 12, 2001). If the state court gives an affirmative answer, the Supreme Court will need to decide whether the availability of a plain-error exception to a state procedural rule means that federal courts may ignore a litigant's failure to satisfy that procedural rule. In this circuit, at least for the time being, *Prihoda* and other cases give a negative answer. Thus we cannot accept the broad reading of *Dictado*. And it follows that we do not treat *Rice* as adopting that broad reading either, for if *Rice* had done so it would have needed to overrule *Fernandez* and *Jefferson*, which it did not.

There is another possible reading of *Rice*: as a proposal to replace (for purposes of §2244) the rule announced in *Harris*, *Coleman*, and *Ylst* that the ruling of the *last* state court is dispositive (for purposes of locating an independent and adequate state ground) with a rule that the decision of the *first* state court determines whether a state collateral attack was "properly filed." That would not do Brooks any good, however, for in his case the state's court of first instance treated his petition as untimely. We think it best to leave to future litigation, when the matter has been fully briefed, the question whether federal courts should disregard state appellate decisions (as *Rice* seemingly did) when deciding whether a state collateral attack has been "properly filed." One could say in support of such an approach that it avoids mousetrapping the prisoner. If the state's court of first instance accepts a collateral attack and resolves it on the merits, the prisoner sensibly will assume that time has been tolled under §2244(d)(2); by the time the

state's court of appeals reverses, it may be too late to file a federal petition. Yet in many cases (of which Brooks' is a good example) counsel for the state argues from the get-go that the petition is untimely, and this puts the prisoner on notice of the need to file a precautionary federal petition (see *Tinker v. Hanks*, 172 F.3d 990 (7th Cir. 1999); *Freeman*, 208 F.3d at 577) in case the state judiciary, trial or appellate, agrees with that view. Brooks was not misled and knew, from the instant the state court rejected his petition as untimely, that the clock was ticking under §2244(d).

These considerations also knock out Brooks' request for equitable estoppel, beyond the circumstances detailed in §2244(d). The state did not mislead him; to the contrary, it has asserted throughout that the state collateral attack was not properly filed, providing Brooks with information that should have led him to get the federal petition on file earlier. We held in *Taliani v. Chrans*, 189 F.3d 597 (7th Cir. 1999), that equitable tolling or estoppel is not absolutely negated by the list of tolling circumstances in §2244(d) but added there—and have reiterated since, see *Owens v. Boyd*, 235 F.3d 356 (7th Cir. 2000)—that because the AEDPA has its own list of tolling circumstances, only "some impediment of a variety not covered in §2244(d)(1) [that] prevents the filing of a federal collateral attack" (235 F.3d at 360) could suffice. Otherwise "estoppel" is hard to differentiate from judicial disagreement with the statutory list of circumstances that extend the time. *United States v. Brockamp*, 519 U.S. 347, 351-52 (1997), holds that such lists are presumptively closed-ended. Nothing *prevented* Brooks from filing earlier, and no deceit by the state has been alleged, so he cannot take advantage of any extra-statutory extension of time.

One further argument requires only brief attention. Brooks contends that his appeal within the state system was itself "a properly filed application for State post-con-

viction or other collateral review"; if the time devoted to the appeal is excluded from the calculation, then Brooks' federal petition is timely. This finds support in *Villazana v. Page*, 1999 U.S. Dist. LEXIS 7927 *11-13 (N.D. Ill. May 5, 1999), but the position is unsound. A notice of appeal is not an "application for . . . collateral review." The "application" is the request (here a petition for a writ of habeas corpus), filed in the court of first instance. Some states permit appellate courts to *be* courts of first instance for this purpose, and when an application's first stop is an appellate court, time devoted to its consideration is excluded under §2244(d)(2). But Brooks began in the state's circuit court, not in its appellate court, and his notice of appeal was not a new "application." An appeal marks the continuation of existing litigation, not the initiation of new litigation. This is why, for example, we held in *Fernandez* that time after a trial court's decision, and before the filing of a timely notice of appeal, is excluded by §2244(d)(2): there is just one continuous case.

Treating a notice of appeal as an "application for . . . collateral review" not only would require the time between trial and appellate courts to count against the statutory year (surprising many petitioners who have been anticipating its exclusion) but also would knock out most appeals within the federal system. For a prisoner needs appellate approval to launch a second or successive federal collateral attack. See 28 U.S.C. §2244(b), §2255 ¶8. If a notice of appeal is itself an "application for . . . collateral review" then any prisoner who fails to obtain relief from the district court needs permission under §2244(b) or §2255 ¶8 to appeal (because the appeal would be the second federal collateral attack)—and given the limitations of those sections, which are much more restrictive than the certificate of appealability under §2253(c), that request would be denied almost routinely. Brooks himself could not obtain appellate review of the order dismissing his petition, because he does not

meet the requirements for a second or successive collateral attack. So we hold that an appeal is not a new collateral attack, a decision that is much to the benefit of most prisoners seeking collateral review, even though it means that Brooks' federal application is untimely.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Supreme Court, U.S.
FILED
MAR 20 2002
CLERK

No. 01-873

IN THE
SUPREME COURT OF THE UNITED STATES

EDWIN R. BOWEN, WARDEN,

Petitioner,

v.

KEVIN RICE,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

RESPONDENT'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FREDERICK F. COHN
601 S. LaSalle Street
Suite 700
Chicago, IL 60605
(312) 641-0692
Counsel for Respondent

2981

TABLE OF CONTENTS

Page

Table of Contents..... i

Table of Authorities Cited..... ii

ARGUMENT:

Certiorari should be denied for any and/or all of the following reasons: .. 1

Introduction..... 2

(1) This is not a proper case to resolve the questions presented, because the finding by a State reviewing court that defendant's Illinois Post-Conviction ["PC"] Petition was untimely -- which is the State's basis for asserting the PC was not "properly filed," and hence that the federal habeas was untimely -- is patently invalid, because the State Appellate Court decision that found untimeliness upon a theory that the reviewing court could consider this issue, even though not raised below, has been totally overruled and invalidated by a subsequent Illinois Supreme Court decision, People v. Wright, 189 Ill.2d 1, 723 N.E.2d 230, 243 Ill. Dec. 198 (1999), holding that, where not raised below, the untimeliness issue is waived and the Illinois State Post-Conviction ["PC"] Petition is timely..... 3

(2) The 7th Circuit decision the State relies upon to show a conflict within the 7th Circuit, Brooks v. Cowan, ___ F.3d ___, 2002 U.S. App. LEXIS 1556 (7 Cir. 2002), is not final, as it may be re-evaluated; a Petition for Rehearing *en banc* (filed 2/02/02) is pending in Brooks v. Cowan..... 5

(3) Petitioner's position depends on applying here, the Harris v. Reed, 489 U.S. 255 (1989), analysis from the procedural default context; this is completely wrong, because per this Court's decision in Artuz v. Bennett, 531 U.S. 4 (2000), the Harris v. Reed doctrine does not apply in the federal habeas limitations tolling context..... 6

(4) The Illinois PC Statute's Limitations provision, on the basis of which the State Appellate Court held the PC Petition was untimely [see (1), above] -- on which decision the federal court relied to hold the PC Petition was not "properly filed" and hence, that the federal habeas petition was untimely -- is unconstitutional, as it violates the due process and equal protection clauses of the 14th Amendment to the U.S. Constitution..... 9

Conclusion..... 13

TABLE OF AUTHORITIES CITED

Page

Cases

Artuz v. Bennett, 531 U.S. 4 (2000)..... 2, 3, 6, 7, 8

Brooks v. Cowan, ___ F.3d ___,
2002 U.S. App. LEXIS 1556
(7 Cir. 2002), pet. for rhrg.
en banc filed Feb. 2, 2002,
pending..... 1, 5, 6, 8

Dictado v. Ducharme,
244 F.3d 724 (9 Cir. 2001)..... 8

Emerson v. Johnson,
243 F.3d 931 (5 Cir. 2001)..... 8

Fernandez v. Sternes,
227 F.3d 977 (7 Cir. 2000)..... 8

Hardy v. Sec'y for the Dep't of Corr.,
246 F.3d 1300 (11 Cir. 2001)..... 8

Harris v. Reed, 489 U.S. 255 (1989)..... 2, 3, 6, 7, 8

Jackson v. Virginia,
443 U.S. 307 (1979)..... 10

Jefferson v. Welborn,
222 F.3d 286 (7 Cir. 2000)..... 8

Leary v. United States,
395 U.S. 6 (1969)..... 9-10

Mobile, J. & K. C. R. Co. v.
Turnipseed, 219 U.S. 35 (1910)..... 10

Nara v. Frank,
264 F.3d 310 (3 Cir. 2002)..... 8

People v. Rice, No. 1-97-1181
(Ill.App.Ct. 1st Dist.
May 17, 1999) (unpub. Ord.)..... 4

People v. Rissley, No. 82536
(Ill.Sup.Ct. 3/15/01),
___ Ill.2d ___ (2001)
(pet. for rhrg. pending)..... 5

People v. Sowewimo, No. 1-99-2359
(Ill.App.Ct. 1st Dist.,
Jan. 28, 2002) (unpub. Ord.)..... 5

People v. Wright, 189 Ill.2d 1,
723 N.E.2d 230,
243 Ill.Dec. 198 (1999)..... 1, 3, 4

Rice v. Bowen,
264 F.3d 698 (7 Cir. 2001)..... 8

Romer v. Evans, 517 U.S. 620 (1996)..... 10

Smith v. Ward,
209 F.3d 383 (5 Cir. 2000)..... 8

Snow v. Ault,
238 F.3d 1033 (8 Cir. 2001)..... 8

United States v. Jackson,
390 U.S. 570 (1968)..... 10

United States v. Ross,
92 U.S. (23 Wall.) 281,
23 L.Ed. 707 (1876)..... 10

Constitutional Provisions,
Statutes and Rules

U.S. Const., 14th Amend.
(due process & equal protection clauses)... 2, 9, 10, 12

28 U.S.C. §§ 2244(d)(1)(A)
& 2244(d)(2)..... *passim*

725 ILCS 5/122-1..... 4, 10

725 ILCS 5/122-1(c)..... 9, 10

Ill.Sup.Ct. Rule 23..... 4, 5

Other Authority

ANNUAL REPORT OF THE ILLINOIS COURTS, STATISTICAL SUMMARY - 1999, compiled and published by the Administrative Office of the Illinois Courts..... 11

ARGUMENT

Certiorari should be denied for any and/or all of the following reasons:

(1) This is not a proper case to resolve the questions presented, because the finding by a State reviewing court that defendant's Illinois Post-Conviction ["PC"] Petition was untimely -- which is the State's basis for asserting the PC was not "properly filed," and hence that the federal habeas was untimely -- is patently invalid, because the State Appellate Court's decision that found untimeliness upon a theory that the reviewing court could consider this issue, even though not raised below, has been totally overruled and invalidated by a subsequent Illinois Supreme Court decision, People v. Wright, 189 Ill.2d 1, 723 N.E.2d 230, 243 Ill. Dec. 198 (1999), holding that, where not raised below, the untimeliness issue is waived and the Illinois State Post-Conviction ["PC"] Petition is timely.

(2) The 7th Circuit decision the State relies upon to show a conflict within the 7th Circuit, Brooks v. Cowan, ___ F.3d ___, 2002 U.S. App. LEXIS 1556 (7 Cir. 2002), is not final, as it may be re-evaluated; a Petition for Rehearing *en banc* (filed 2/02/02) is pending in Brooks v. Cowan.

(3) Petitioner's position depends on applying here, the Harris v. Reed, 489 U.S. 255 (1989), analysis from the procedural default context; this is completely wrong, because per this Court's decision in Artuz v. Bennett, 531 U.S. 4 (2000), the Harris v. Reed doctrine does not apply in the federal habeas limitations tolling context.

(4) The Illinois PC Statute's Limitations provision, on the basis of which the State Appellate Court held the PC Petition was untimely [see (1), above] -- on which decision the federal court relied to hold the PC Petition was not "properly filed" and hence, that the federal habeas petition was untimely -- is unconstitutional, as it violates the due process and equal protection clauses of the 14th Amendment to the U.S. Constitution.

Introduction

The position of the State in its Petition for Certiorari, p. 17, and in its Supplemental Brief ["Supp.Br."] in support thereof, p. 1 -- on which its argument totally depends -- is that under Harris v. Reed, 489 U.S. 255 (1989) (per the State, "in the realm of procedural default," Supp.Br. p. 1), where a defendant's State collateral attack is denied both on the merits and based on untimeliness, untimeliness prevails; and this means that the State collateral attack here was not properly filed.

Interesting though this proposition may be, this case is

not a proper vehicle for this Court to resolve this issue[1] -- because, here, there never was a valid determination by any State Court (i.e., trial court, or Appellate Court), that the PC was not timely filed.

(1) This is not a proper case to resolve the questions presented, because the finding by a State reviewing court that defendant's Illinois Post-Conviction ["PC"] Petition was untimely -- which is the State's basis for asserting the PC was not "properly filed," and hence that the federal habeas was untimely -- is patently invalid, because the State Appellate Court's decision that found untimeliness upon a theory that the reviewing court could consider this issue, even though not raised below, has been totally overruled and invalidated by a subsequent Illinois Supreme Court decision, People v. Wright, 189 Ill.2d 1, 723 N.E.2d 230, 243 Ill. Dec. 198 (1999), holding that, where not raised below, the untimeliness issue is waived and the Illinois PC Petition is timely.

First, here, the trial court dismissed the PC action, SOLELY on the merits. The issue of timeliness was not raised by the State in the trial court, nor was it addressed by the trial court sua sponte.

---

[1] For defendant's substantive response to this Harris v. Reed approach, see Point (3), infra. This Court rejected this approach, 9-0, in Artuz v. Bennett, 531 U.S. 4 (2000).

Second, the State Appellate Court ruled against defendant solely on the merits, in People v. Rice, No. 1-97-1181, pp. 1-8,[2] and then ruled that it could evaluate timeliness (raised for the first time by the State in its Appellee's Brief in defendant's PC appeal), even though the issue had not been raised or decided in the trial court. (Id., pp. 8-12) This ruling is totally invalid. The Illinois Supreme Court's position is unequivocally stated in People v. Wright, 189 Ill.2d 1, 723 N.E.2d 230, 243 Ill.Dec. 198 (1999), holding that when the State does not raise the issue of untimeliness of a PC Petition in the trial court -- thereby denying defendant an opportunity to demonstrate that defendant was not "culpably negligent" under the State PC statute, i.e., 725 ILCS 5/122-1, that permits under certain circumstances, for a PC petition to be considered timely filed, at a time that would otherwise be late filing -- the State can not raise that issue on appeal, and hence the PC is treated as timely filed. Id. at 236, 243 Ill.Dec. at 204.

Hence, under decisional law of the Illinois Supreme Court, as it now exists, the PC Petition here was timely filed.

Thus, defendant's PC Petition was timely filed under Illinois law; accordingly, it was "properly filed" under 28

---

[2] This May 17, 1999 decision of the Appellate Court is a non-published Order, of no precedential worth under Ill.Sup.Ct. Rule 23.

U.S.C. § 2244(d)(1)(A) & 2244(d)(2), for federal habeas corpus timeliness purposes.[3]

(2) The 7th Circuit decision the State relies upon to show a conflict within the 7th Circuit, Brooks v. Cowan, ___ F.3d ___, 2002 U.S. App. LEXIS 1556 (7 Cir. 2002), is not final, as it may be re-evaluated; a Petition for Rehearing *en banc* (filed 2/02/02) is pending in Brooks v. Cowan.

---

[3] If the matter had been raised in the State PC trial court, a court might have found no culpable negligence by defendant. For example, in People v. Sowewimo, No. 1-99-2359 (Ill.App.Ct., 1st Dist., 1st Div., Jan. 28, 2002) (unpublished Order per Ill.Sup.Ct.Rule 23), the Appellate Court affirmed that portion of the PC trial court's ruling that the delay in filing the PC petition was not due to Sowewimo's culpable negligence; the Appellate Court wrote:

> "However, in deciding the culpability of Sowewimo [re time of filing PC], we recognize that, prior to Rissley, Illinois court decisions interpreting 'culpable negligence' 'flip flopped.' In the past, even our most learned lawyers and judges have been mistaken on this issue." Sowewimo, supra, at 6. (Emphasis added.)

["Rissley" is People v. Rissley, 3/15/01, # 82536, Ill.Sup.Ct., pet for rhrg pndg.]

The State's reliance (Supp.Br. pp. 1-3), on the Feb. 2, 2002 decision of Brooks v. Cowan, ___ F.3d ___, 2002 U.S. App. LEXIS 1556 (7 Cir. 2002), as demonstrating a conflict within the 7th Circuit with respect to the AEDPA's "properly filed" tolling exception, is premature, because that decision is not final. A petition for rehearing *en banc* was filed in the 7th Circuit on Feb. 15, 2002, and that petition remains pending as of March 12, 2002. Hence, certiorari should not be granted to resolve any purported conflict within the 7th Circuit, while that Circuit itself still has an opportunity to resolve the conflict on rehearing in Brooks v. Cowan.

(3) Petitioner's position depends on applying here, the Harris v. Reed, 489 U.S. 255 (1989), analysis from the procedural default context; this is completely wrong, because per this Court's decision in Artuz v. Bennett, 531 U.S. 4 (2000), the Harris v. Reed doctrine does not apply in the federal habeas limitations tolling context.

The State's assertion that the Harris v. Reed principle from the realm of procedural default, applies to the timeliness issue (see *Introduction*, pp. 2-3, supra), confuses the doctrine of when, on the merits, a federal habeas corpus issue is deemed procedurally defaulted because although the State court decided the merits, the issue was alternatively resolved in the State court on an adequate, independent State law basis -- with the issue at hand, which is, whether the federal habeas court can find the federal habeas corpus petition was filed within 1

year of final disposition of a properly filed State court collateral attack such as a PC petition.

The reason for the difference is self-evident, once it is understood that Congress, in enacting the limitations and tolling provisions of the AEDPA, intended to be fair by providing the State Court litigant 1 year after his collateral attack has been denied by the highest State court considering the cause. Applying the Harris v. Reed doctrine to the question of "properly filed" for habeas timeliness purposes, would defeat the fairness intended by Congress.

Assume a State collateral attack is filed, and the State asserts it is late. It is litigated, and the trial court rules, pursuant to State law exceptions (e.g., lack of culpable negligence by defendant), that the filing is timely. The State appeals, and the first State reviewing court also rules it is timely. The cause proceeds to the State's highest court. Surely, more than one year of litigation would have occurred. Then, the highest State court rules the collateral attack does not qualify under the State exception and therefore, it was late. To hold that hence, it was not "properly filed" for AEDPA limitations tolling purposes -- even though defendant delayed filing his habeas in federal court because he was still litigating his collateral attack in State court -- would be so inherently unfair as to violate due process.

Cases decided before Artuz v. Bennett, 531 U.S. 4

(2000), i.e., Fernandez v. Sternes, 227 F.3d 977 (7 Cir. 2000), and Jefferson v. Welborn, 222 F.3d 286 (7 Cir. 2000) (see Supp.Br. p. 2),[4] are inapplicable.

Accordingly, the State's position in this regard is plainly wrong, because application of the Harris v. Reed analysis to the federal habeas limitations tolling context, conflicts with this Court's unanimous decision in Artuz v. Bennett, supra.

Decisions holding in accord with the Rice v. Bowen, 264 F.3d 698 (7 Cir. 2001), approach in this regard and contra to the Brooks decision cited by the State, include the following authoritative decisions of other U.S. Courts of Appeals that have addressed the issue, all, rejecting application of Harris v. Reed analysis to context at hand: Smith v. Ward, 209 F.3d 383 (5 Cir. 2000); Emerson v. Johnson, 243 F.3d 931 (5 Cir. 2001); Dictado v. Ducharme, 244 F.3d 724 (9 Cir. 2001); see also Nara v. Frank, 264 F.3d 310 (3 Cir. 2002).[5]

---

[4] In those cases, the 7th Circuit applied Harris v. Reed in the manner the State now urges. (See Supp.Br. p. 2.)

[5] See also Snow v. Ault, 238 F.3d 1033 (8 Cir. 2001), and Hardy v. Sec'y for the Dep't of Corr., 246 F.3d 1300, 1301-02 (11 Cir. 2001), rejecting application of Harris v. Reed analysis in context of "successive" State collateral attack petitions.

(4) The Illinois PC Statute's Limitations provision, on the basis of which the State Appellate Court held the PC Petition was untimely [see (1), above] -- on which decision the federal court relied to hold the PC Petition was not "properly filed" and hence, that the federal habeas petition was untimely -- is unconstitutional, as it violates the due process and equal protection clauses of the 14th Amendment to the U.S. Constitution.

Alternatively, the Illinois PC Statute of Limitations is unconstitutional -- yet another basis why this Court should refrain from granting certiorari.

Unconstitutionality of Illinois PC Statute of Limitations

The limitations period of the Illinois PC hearing act, 725 ILCS 5/122-1(c), is unconstitutional -- in violation of due process of law and equal protection of the laws, under the 14th Amendment to the U.S. Constitution -- because it sets up a time-table[6] that irrationally and arbitrarily treats differently, persons in essentially the identical situation. The irrationality violates due process, see Leary v. United States, 395 U.S. 6, 36

---

[6] That is, persons who do appeal, have a time-period that extends until 6 months after denial of leave to appeal (or expiration of time for filing petition for leave to appeal, if none is filed), while persons who do not appeal, have 3 years from date of conviction -- whichever is sooner.

(1969),[7] and the arbitrariness (absent compelling State interest) violates the equal protection clause, see Romer v. Evans, 517 U.S. 620 (1996); cf. United States v. Jackson, 390 U.S. 570 (1968).

The Illinois Post-Conviction Hearing Act, 725 ILCS 5/122-1, et seq., requires that a petition be filed

> "[not] more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition is none is filed or more than 45 days after the defendant files his or her brief in the appeal of a sentence before the Illinois Supreme Court (or more than 45 days after the deadline for the filing of the defendant's brief with the Illinois Supreme Court if no brief is filed) or 3 years from the date of conviction, whichever is sooner." 725 ILCS 5/122-1(c).

The State PC statute of limitations as it exists and was applied here, is irrational, because the length of time a person has to file a PC petition can vary immensely on a

---

[7] This Court has long required rationality as a fundamental requirement of due process, striking down as violative of due process, that which is irrational. E.g., Jackson v. Virginia, 443 U.S. 307 (1979); Leary, cited in the text; United States v. Ross, 92 U.S. (23 Wall.) 281, 283-84, 23 L.Ed. 707, 708 (1876); Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35 (1910).

case-by-case basis, due to factors that have no legitimate bearing on a statute of limitations. Since under the statute, a defendant has six (6) months after the end of direct review within which to file a PC Petition, a number of variables -- outside the individual's ability to control -- substantially affect how much time one has to file for PC relief. E.g., the Administrative Office of the Illinois Courts has published statistics demonstrating that the time it takes for appeals to be resolved, differs greatly between different judicial districts.[8]

One factor affecting the time for appeals to be resolved, is the length of time it takes to obtain the transcript of a trial. Hence, in a county with an over-crowded appellate docket, transcripts may be hard to come by expeditiously, whereas in other counties, where there are fewer appeals, transcripts may be readily available.

These and similar factors outside the defendant's control determine how long a time one has to file for PC

---

[8] See Annual Report of the Illinois Courts, Statistical Summary - 1999, pp. 141-42, compiled and published by the Administrative Office of the Illinois Courts. This official document demonstrates that some appeals in some Illinois Appellate Districts are disposed of in less than 6 months from when the case was filed, and/or from when briefs were filed, while others are not disposed of for 3 years or even more thereafter.

relief. Since the time allowed by this statute of limitations fluctuates wildly depending upon how long it takes for an appeal to be resolved, and there are so many uncontrollable variables involved, the statute is irrational and hence, unconstitutional.

There is no rational basis, and no compelling State interest, why some persons should have 3 years to file a PC, and some, 2 years, and some, 18 months, and some, only 1 year. This arbitrary irrationality violates both due process of law and equal protection of the laws.

Such an arbitrary and irrational statutory set-up is unconstitutional, in violation of the 14th Amendment. (See cases and discussion at pp. 9-10, supra.)

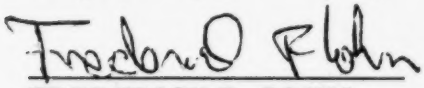
* * *

For any and/or all of the above reasons, it would be improvident for this Court to grant certiorari; and, if certiorari is nonetheless allowed to consider the questions presented by the Petitioner, then this Court should also consider the issue whether the Illinois PC statute of limitations that forms the basis of the determination that the habeas was untimely, is unconstitutional.

CONCLUSION

For any and/or all of the foregoing reasons, certiorari should be denied. Alternatively, if certiorari is allowed, then this Court should also consider the issue of whether the Illinois PC Statute of Limitations is unconstitutional.

Respectfully submitted,



FREDERICK F. COHN
Attorney for Respondent

Dated: March 16, 2002